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No. 1717

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED. HOGAN, as Sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of the U.S. Circuit Court of Appeals

350

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Index.

Names and Addresses of Attorneys of Record.

Messrs. WIGHT & PEW, Helena, Montana,
Solicitors for Complainant and Appellee.

Messrs. CLAYBERG & HORSKY, of Helena, Montana, and A. C. GORMLEY, Esq., of Great Falls, Montana,
Solicitors for Defendants and Appellants.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 892—IN EQUITY.

CHARLES D. McLURE,
Complainant,

vs.

GREAT FALLS NATIONAL BANK et al.,
Defendants.

Be it remembered, that on the 3d day of December, 1908, complainant filed its Bill of Complaint herein, which said bill of complaint is in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

CHARLES D. McLURE,
Complainant,

vs.

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED. HOGAN, as Sheriff of Cascade County, State of Montana,
Defendants.

Bill of Complaint.

To the Honorable The Judges of the Circuit Court of the United States for the Ninth Circuit, District of Montana.

Comes now the above-named complainant, Charles D. McLure, a citizen and resident of the State of Missouri, and brings this his bill of complaint against the Great Falls National Bank, a resident of the State of Montana, and the American Engineering Works, a Corporation, a resident of the State of West Virginia, and Ed Hogan, as Sheriff of the County of Cascade, State of Montana, and a resident of said State; and respectfully shows unto your Honors:

I.

That your orator, Charles D. McLure, is and at all the times hereinafter mentioned was a citizen of the United States, and a citizen and resident of the State of Missouri.

II.

That the defendant Great Falls National Bank is and at all of the times hereinafter mentioned was a corporation organized and existing under and by virtue of the National Banking Laws of the United States of America, and doing business in the City of Great Falls, Cascade County, State of Montana, and a resident of said State of Montana.

III.

That said defendant American Engineering Works is and at all of the times hereinafter mentioned was

a corporation organized and existing under and by virtue of the laws of the State of West Virginia.

IV.

That the defendant Ed Hogan is and at all times since the 7th day of January, 1907, has been the duly elected, qualified and acting sheriff of the County of Cascade, State of Montana.

V.

That on the 14th day of December, 1901, your orator instituted an action at law in the above-entitled court against the Diamond R. Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Montana; that on said 14th day of December, 1901, a writ of summons and a writ of attachment were duly issued out of said Circuit Court in said action so instituted by your orator and delivered to the Marshal of said United States for said District of Montana for service and levy; that in pursuance of said writ of attachment said Marshal duly levied upon all of the personal property of said Diamond R. Mining Company by taking said property into his possession on the 18th day of December, 1901; that on the 16th day of December, 1901, said Marshal also duly levied, under and in pursuance of said writ of attachment, upon all of the real property of said Diamond R. Mining Company by filing a copy of said writ of attachment with the Clerk and Recorder of the County of Cascade, State of Montana, in which said county said real property and the whole thereof was situated, and by filing with said Clerk and Recorder

at the same time a notice in due form that said real property, together with all the fixtures and appurtenances thereto belonging, was attached; that thereafter, to wit, on the 16th day of January, 1902, a judgment was duly given, made and entered, in said Circuit Court of the United States for the Ninth Circuit, District of Montana, in which Court said action was pending as aforesaid, at the city of Helena, Lewis and Clark County, State of Montana, in favor of your orator and against said defendant Diamond R. Mining Company, for the sum of Eighty-six Thousand One Hundred and Eighty Dollars ($86,180.00), together with Fifty-three and 30/100 Dollars ($53.30) costs.

VI.

That thereafter,to wit, on the 10th day of January, 1907, your orator caused to be issued out of said Circuit Court of the United States for the Ninth Circuit, District of Montana, in said action described in paragraph V hereof, a writ of execution, in proper form, which said writ was directed and delivered to the United States Marshal for the District of Montana, and which said writ commanded said Marshal to levy upon and sell all of the property of the said Diamond R. Mining Company found in said District of Montana, and to apply the proceeds thereof, or so much thereof as might be necessary, to the satisfaction of said judgment in said action, together with interest and costs of sale.

VII.

That in pursuance of said writ of execution said

Marshal duly levied upon said real and personal property of said Diamond R. Mining Company in said County of Cascade, State of Montana, said property being all of the property of said Diamond R. Mining Company, and after giving due and legal notice of sale of said personal property, sold the same to your orator, Charles D. McLure, he being the highest and best bidder therefor; and that your orator is still the owner of said personal property and the whole thereof.

VIII.

That on the 26th day of February, 1907, said Marshal, having theretofore given due and legal notice of sale thereof, in the manner required by the laws of the State of Montana and by the rules of this Honorable Court, sold said real property so levied upon, together with the fixtures thereof and the appurtenances thereto belonging, and the whole thereof, to your orator, he being the highest and best bidder therefor; and that on said 26th day of February, 1907, said Marshal duly made, executed and delivered to your orator his certificate of sale of said real property so sold to your orator, a copy of which said certificate of sale is hereto annexed, marked Exhibit "A," and by this reference made a part hereof.

IX.

That no redemption of said real property was made within the period of one year from and after said date of said sale, and that on the 27th day of February, 1908, said Marshal of the United States

for the District of Montana duly made, executed and delivered to your orator, in due form, his deed of said real property described in said certificate of sale and the whole thereof, together with the fixtures and appurtenances thereto belonging, and that your orator is still the owner and in possession of said real property and the fixtures and appurtenances thereto belonging, and the whole thereof.

X.

And your orator further shows unto your Honors that on or about the —— day of February, 1902, said defendant, Great Falls National Bank, recovered, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, a judgment in an action therein pending in which said bank was the plaintiff and said Diamond R. Mining Company was the defendant; that thereafter, to wit, on the 17th day of December, 1904, said defendant American Engineering Works recovered a judgment in an action then pending in said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, entitled American Engineering Works, plaintiff, versus Diamond R. Mining Company, defendant.

XI.

That on the 8th day of January, 1907, said defendants Great Falls National Bank and American Engineering Works filed in the above-entitled court, in the said suit in which your orator recovered his said judgment of $86,180 against said Diamond R. Min-

ing Company, as set forth in paragraph V hereof, their separate bills in intervention, alleging therein certain matters and things against your orator, and praying for an order restraining your orator from selling said property of the said Diamond R. Mining Company under his said judgment; that thereafter said defendants filed in said cause their supplemental bills of complaint in intervention, and that thereafter, to wit, on the 2d day of February, 1907, said bills of complaint in intervention and both thereof, and said supplemental bills of complaint in intervention, were by your Honors dismissed.

XII.

That thereafter, to wit, on the 25th day of February, 1907, said defendant, Great Falls National Bank, filed in the above-entitled court (that is, the Circuit Court of the United States for the Ninth Circuit, District of Montana) its bill of complaint, No. 815, in equity, against Charles D. McLure (your orator), Diamond R. Mining Company, and A. W. Merrifield, United States Marshal for the District of Montana, a copy of which said bill of complaint (omitting therefrom, however, Exhibit "B," of said complaint, being a schedule of the personal property sold by your orator under his judgment against said Diamond R. Mining Company, the same not being in any way involved in this action) is hereto annexed, marked Exhibit "B," and by this reference is hereby made a part hereof; that your orator duly demurred to said bill of complaint, on the ground that the same did not state facts sufficient to entitle said Great

Falls National Bank, the complainant therein, to any relief whatsoever, which said demurrer was by your Honors sustained, and a decree of dismissal of said bill of complaint duly made, given and entered in said cause on the 6th day of August, 1907.

XIII.

That thereafter, said Great Falls National Bank prosecuted an appeal from the said decree of dismissal of said bill of complaint to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California; that said appeal coming on regularly to be heard before said Circuit Court of Appeals the said decree of your Honors was duly affirmed, the decision of said Circuit Court of Appeals in said cause being reported in Volume 161 of the Federal Reporter, at pages 56 to 60, inclusive, to which said decision reference is hereby made; that said decision is still in force, unmodified and unreversed.

XIV.

And your orator further shows, that said defendant American Engineering Works did also, on said 25th day of February, 1907, file in said Circuit Court of the United States for the Ninth Circuit, District of Montana, its bill of complaint, No. 814, in equity, against Charles D. McLure (your orator), Diamond R. Mining Company, and A. W. Merrifield, United States Marshal for the District of Montana; that said bill of complaint was in all its allegations against your orator identical with the said bill of complaint of said defendant bank, described in para-

graph X hereof; that your orator likewise filed his demurrer, in proper form, to said bill of complaint, and your Honors likewise sustained his said demurrer, and a decree was accordingly made, given and entered in said action for the dismissal of said bill of complaint.

XV.

That on or about the 30th day of August, 1907, a stipulation and agreement was duly made and entered into by and between the respective counsel of the said American Engineering Works and of your orator, in said suit set forth in paragraph XIV hereof, wherein and whereby it was stipulated and agreed by and between the respective parties to said suit, through their respective solicitors and counsel, that said suit should stand unappealed from and should follow and abide by the decision of the said United States Circuit Court of Appeals in the said cause of Great Falls National Bank against your orator and others, as set forth in paragraph X hereof, and that said decree stands unappealed from, unmodified and unreversed.

XVI.

That among the fixtures of and the appurtenances belonging to said mining property described in said Exhibit "A," and belonging to your orator, are certain ore bins located upon the right of way of the Montana Central Railway Company, the same being adjacent to the said concentrator described in said Exhibit "A"; also a certain tramway leading from said concentrator to said ore bins; also a certain

blacksmith-shop situated upon said right of way of said railway; and also certain machinery and tools, all of which ore bins, tramway, blacksmith-shop, machinery and tools are and ever since the same were placed upon said ground have been used in working and developing said mining property described in said Exhibit "A," and for no other purpose, and are, under the laws of the State of Montana, fixtures of and appurtenances belonging to said mining property, and your orator is and at all the times herein mentioned was the owner thereof and the whole thereof.

XVII.

That said defendant Great Falls National Bank did, on or about the 7th day of November, 1908, cause a writ of execution to be issued out of the office of the Clerk of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in said action therein pending in which said bank was the plaintiff and the Diamond R. Mining Company was the defendant, as set forth in paragraph X hereof, said writ being directed to said defendant Ed. Hogan, as such Sheriff, and commanding him, the said Sheriff, to levy upon and sell any property of the said Diamond R. Mining Company found in said County of Cascade, State of Montana, and to apply the proceeds thereof as in said writ of execution directed, a copy of said writ being hereto annexed, marked Exhibit "C," and hereby made a part hereof; that said defendant American Engineering Works did, on or about said

7th day of November, 1908, cause to be issued a similar writ out of said court, in said action therein pending, in which said American Engineering Works was plaintiff and said Diamond R. Mining Company was defendant, as set forth in paragraph X hereof, and a copy of which writ of execution is hereto annexed, marked Exhibit "D," and hereby made a part hereof.

XVIII.

That said writs of execution were delivered to said defendant, Ed. Hogan, on or about the said 7th day of November, 1908, for levy; that said defendants American Engineering Works and Great Falls National Bank, conspiring together to harass your orator, and to defraud and deprive him of his said property, and ignoring and disregarding the decrees and orders and process of this Honorable Court, and well knowing that said property was then and there and still is the property of your orator, directed and procured said Sheriff to levy or make a pretended levy upon, and sell certain of said mining property described in said Exhibit "A," and so belonging to your orator, including said ore bins, tramway, blacksmith-shop, a portion of said power-house described in said Exhibit "A," and certain other of the fixtures and appurtenances of said mining property so transferred to and owned by your orator as hereinbefore fully set forth; that on the 20th day of November, 1908, said Sheriff made a pretended sale of said property under said writs of execution, to one R. S. Ford, for and on behalf of said

Great Falls National Bank; that said defendant Ed. Hogan as such Sheriff as aforesaid, has given notice, by posting and by publication, that he will sell the Equator Quartz Lode Mining Claim at public auction on the 4th day of December, 1908, at the City of Great Falls, Montana, under and by virtue of said writ of execution aforesaid; that said defendants will, unless restrained by your Honors, sell said Equator Quartz Lode Mining Claim (said mining claim being a part of the real property described in Exhibit "A" hereto attached), and will seize and remove said fixtures and appurtenances so pretended to be sold on November 20th, 1908, as aforesaid; thereby greatly injuring the said property of your orator and casting a cloud upon the title of your orator to said mining property, all to the great and irreparable loss and injury of your orator.

XIX.

That said defendants well knew, at the time of the issuance and levy of said writs of execution, and have known at all times since said time, that said Diamond R. Mining Company has not now, nor since said 26th day of February, 1907, has had any right, title or interest of, in or to said property or any thereof.

XX.

That your orator has no plain, speedy and adequate remedy at law.

XXI.

That the amount in controversy herein is greatly in excess of the sum of $2,000.00, exclusive of inter-

est; that is to say, the said property so pretended to be sold as aforesaid, and of which your orator will be deprived unless your orator is granted relief by your Honors, is of the reasonable value of more than $2,000.00.

XXII.

That this bill of complaint in equity is brought by your orator as ancillary to and in aid of said action at law so instituted by your orator in this Honorable Court as set forth in paragraph V hereof, against said Diamond R. Mining Company, and is brought for the purpose of invoking the authority of your Honors to protect the rights of your orator thereunder.

Forasmuch as your orator can have no plain, speedy or adequate remedy, except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereinafter prayed, and may make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of their knowledge, remembrance, information and belief, and full, true and perfect answer make, to the matter hereinbefore stated, but not under oath, an answer under oath being, hereby expressly waived; your orator prays your Honors to grant unto your orator your writ of injunction commanding said defendants and each of them and any and all persons acting under their authority or under the authority of either or any of them, to desist from further proceeding under said writs of execution, and that said

defendants and each of them and any and all persons acting under their authority or under the authority of either or any of them, desist and refrain from proceeding under said pretended sale and from seizing or removing or in any way interfering with said property or any thereof, and from interfering with any of the property of your orator herein described, and from proceeding with said sale so advertised for the 4th day of December, 1908, as hereinabove set forth, until such time as your Honors shall direct for hearing an order to show cause herein why said injunction should not be confirmed until the final determination of this suit, and that thereupon the said injunction be made perpetual.

Your orator further prays your Honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said defendants, Great Falls National Bank, American Engineering Works, and Ed. Hogan, Sheriff as aforesaid, to the end that on a day certain they appear and answer unto this bill of complaint, and to abide and perform such orders and decrees in the premises as to your Honors shall seem proper, and required by the principles of equity and good conscience.

WIGHT & PEW,
Solicitors for Complainant.

State of Montana,
County of Lewis and Clark,—ss.

Ira T. Wight, being first duly sworn deposes and says: that he is one of the solicitors for Charles D. McLure, the complainant in the foregoing bill of complaint named; that said Charles D. McLure, complainant herein, is a resident of the City of St. Louis, State of Missouri, and is absent from the State of Montana and the County of Lewis and Clark, wherein this affiant resides, and that for that reason affiant makes this affidavit on behalf of said Charles D. McLure; that affiant is familiar with and knows all the matters and things in said bill of complaint set forth; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein stated are true.

IRA T. WIGHT.

Subscribed and sworn to before me this 3d day of December, 1908.

[Seal] C. E. PEW,
Notary Public in and for Lewis and Clark County, State of Montana.

Exhibit "A" [to Bill of Complaint].

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

CHARLES D. McLURE,

Plaintiff,

vs.

DIAMOND R. MINING COMPANY (a Corporation),

Defendant.

United States Marshal's Certificate of Sale of Real Estate on Execution.

I, Arthur W. Merrifield, Marshal of the United States in and for the District of Montana, do hereby certify that by virtue of an execution in the above-entitled action, tested the 12th day of January, A. D. 1907, by which I was commanded to make the amount of Eighty-six Thousand One Hundred Eighty Dollars ($86,180.00), lawful money of the United States, to satisfy the judgment in said action, with costs and interest thereon, out of the personal property of the Diamond R. Mining Company, the defendant in said action; and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, on the 16th day of January, A. D. 1902, or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears; I have levied on and this day sold at Public Auction, according to the statute in such cases made and provided to Charles D. McLure who was the high-

est bidder, for the sum of One Hundred and Twenty Thousand One Hundred Dollars ($120,100.00), lawful money of the United States, which was the whole price paid by him for the same, the real estate particularly described as follows, to wit:

The Belt No. 2 Quartz Lode Mining Claim.

One-third interest in the Compromise Quartz Lode Mining Claim, Patent No. 1964.

The Moulton Quartz Lode Mining Claim, Patent No. 2471.

The South Carolina Quartz Lode Mining Claim, patent No. 3153.

The Unity Quartz Lode Mining Claim, Patent No. 3253.

Lots 5 and 15 of Block No. 2 of the Frisco Claim.

Lots 1, 2, 3, 4, 5, 12, 13, 14 and 15, Block 3, of the Frisco Claim.

Lots 1 and 2 of Block No. 5 of the Frisco Claim.

Lots 1 and 2, 34, 35 and 36 of Block No. 6 of the Frisco Claim.

A triangular tract or fraction of land adjoining Lot No. 15 in Block No. 2 of the Frisco Claim, on the westerly side thereof; also the bed of all those portions of Hill Street, Frisco Avenue, and an alley running parallel with Main Street, and said Frisco Avenue upon which said lots, or any part thereof abut either upon the front, side or rear thereof; and also all that portion of the Equator Lode Mining Claim which was heretofore conveyed to L. S. McLure by John McAssey and H. J. Skinner by deed duly recorded in the office of the County Clerk and Recorder of said County of Cascade, State of Mon-

tana, and by said L. S. McLure conveyed to Diamond R. Mining Company;

Two water rights on Belt Creek.

Concentrator building, power-house and buildings at mines, and all machinery in all the buildings aforesaid.

The tramway and rights of way for same between Moulton Mine and Concentrator building.

All rights of way for flumes, tramways, tracks, ditches, etc., more particularly described in the deed from L. S. McLure and wife to the Diamond R. Mining Company, and any and all other property, rights or franchises described in said deed, recorded July 13th, 1899, in Book 25 of Deeds, page 401 of the Records of Cascade County, Montana, to which reference is hereby made.

Together with all fixtures and appurtenances thereunto belonging.

All situated in Cascade County, Montana.

Also all right, title or interest, if any, as the Diamond R. Mining Company may have in or to lots 1, 2, 3, and 4 in Block No. 2 of the Frisco Claim, situated at Neihart, Cascade County, Montana, heretofore sold under execution of one G. F. Bartlett, for which sheriff's deed has heretofore been given.

That the price of each distinct lot and parcel was as follows: First parcel, the Belt No. 2 Quartz Lode Mining Claim, the sum of One Hundred Dollars ($100.00).

Second parcel: One-third interest in the Compromise Quartz Lode Mining Claim, Patent No. 1964; the Moulton Quartz Lode Mining Claim, Patent

No. 2471; the South Carolina Quartz Lode Mining Claim, Patent No. 3153; The Unity Quartz Lode Mining Claim, Patent No. 3253; Lots 5 and 15 of Block No. 2 of the Frisco Claim; lots 1, 2, 3, 4, 5, 12, 13, 14 and 15 Block No. 3 of the Frisco Claim; Lots 1 and 2 of Block No. 5 of the Frisco Claim; lots 1 and 2, 34, 35 and 36 of Block No. 6 of the Frisco claim; a triangular tract or fraction of land adjoining lot No. 15 in Block No. 2 of the Frisco Claim, on the westerly side thereof; also the bed of all those portions of Hill Street, Frisco Avenue, and an alley running parallel with Main Street, and said Frisco Avenue upon which said lots, or any part thereof abut, either upon the front, side or rear thereof; and also all that portion of the Equator lode mining claim which was heretofore conveyed to L. S. McLure by John McAssey and H. J. Skinner by deed duly recorded in the office of the County Clerk and Recorder of said County of Cascade, State of Montana, and by said L. S. McLure conveyed to Diamond R. Mining Company; the two water rights on Belt Creek; concentrator building, power-house and buildings at mines and all machinery in all the buildings aforesaid; the tramway and rights of way for same between Moulton Mine and concentrator building; all rights of way for flumes, tramways, tracks, ditches, etc., more particularly described in the deed from L. S. McLure and wife to the Diamond R. Mining Company, and any and all other property, rights or franchises described in said deed, recorded July 13th, 1899, in Book 25 of deeds page

401 of the records of Cascade County, State of Montana, to which reference is hereby made.

Together with all fixtures and appurtenances thereunto belonging.

All situated in Cascade County, Montana; also all right, title or interest if any as the Diamond R. Mining Company may have in or to Lots 1, 2, 3 and 4 of Block No. 2 of the Frisco Claim, situated at Neihart, Cascade County, Montana, heretofore sold under execution of one G. F. Bartlett, for which sheriff's deed has heretofore been given, for the sum of One Hundred and Twenty Thousand Dollars ($120,000.00)

And that the said real estate is subject to redemption in lawful money of the United States, pursuant to the statute in such cases made and provided.

Given under my hand, this 26th day of February, A. D. 1907.

ARTHUR W. MERRIFIELD,

United States Marshal in and for the District of Montana.

By Scott N. Sanford,

Deputy United States Marshal in and for the District of Montana.

Recorded in the office of the County Clerk and Recorder of Cascade County, State of Montana, on the 1st day of May, 1907, in Book 43 of Deeds, at page 436.

Exhibit "B" [to Bill of Complaint].

In the Circuit Court of the United States, Ninth Circuit, within and for the District of Montana.

GREAT FALLS NATIONAL BANK (a Corporation),

Complainant,

vs.

CHARLES D. McLURE, DIAMOND R. MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana,

Defendants.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, for the District of Montana, in Equity Sitting:

Comes now the complainant above named, Great Falls National Bank, a corporation, and brings this, its bill of complaint, against the above-named defendants, Charles D. McLure, a citizen of the State of Missouri, the Diamond R. Mining Company, a corporation, and A. W. Merrifield, United States Marshal for the District of Montana, whereupon your orator complains and says:

1. That the complainant, the Great Falls National Bank, is a corporation duly organized and existing under and by virtue of the national banking laws of the United States, and doing business

as such in the city of Great Falls, county of Cascade and State of Montana.

2. That the defendant, Diamond R. Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of Montana, and holding and owning certain property in the county of Cascade and State of Montana.

3. That the defendant, A. W. Merrifield, is the duly appointed, qualified and acting United States Marshal in and for the District of Montana, and that as such officer, under and by virtue of the writ of execution issued out of this Court in the action of Charles D. McLure vs. Diamond R. Mining Company, defendant, and hereinafter referred to, he has advertised the property hereinafter described for sale at Neihart, Cascade County, Montana, on the 26th day of February, 1907, and is threatening to sell said property at said time and place.

4. That on the 14th day of December, 1901, the defendant, Charles D. McLure, then and at all times a nonresident of the State of Montana, and residing in the city of St. Louis, in the State of Missouri, instituted an action in this court in the City of Helena, County of Lewis and Clark, and State of Montana, as plaintiff against the above named Diamond R. Mining Company, as defendant, and on said date there was issued out of said Court a writ of attachment in said cause, directed and delivered to the United States Marshal for the District of Montana for service; that in pursuance of said writ of attachment said United States Marshal filed a notice

of attachment with the County Clerk and Recorder of the county of Cascade and State of Montana, on the 16th day of December, 1901, thereby levying upon certain real estate in said Cascade County belonging to said defendant Diamond R. Mining Company, and described in said notice, and did also, in pursuance of said writ, on the 18th day of December, 1901, attach and levy upon certain personal property belonging to said defendant company in said county, by taking possession thereof and placing one John L. Tripp in charge thereof as keeper, said Tripp being an employee of said defendant company; for a full and complete description of the property aforesaid reference is hereby made to the list hereto attached, marked Exhibit "AA," and made a part hereof; that the invoice of loose personal property referred to in said exhibit as Exhibit "B," constitutes the machinery, tools, etc., in the concentrator building, power-house and buildings at the mine referred to in Exhibit "A" thereof; that the defendant, Diamond R. Mining Company, had not then, nor has it now, any other property than the said property so attached; that summons in said action was served upon L. S. McLure, as president of the said Diamond R. Mining Company, and on the 16th day of January, 1902, a judgment by default was entered in said cause in the City of Helena, Lewis and Clark County, Montana, in favor of the said Charles D. McLure, as plaintiff, and against the said Diamond R. Mining Company, as defendant, for the sum of eighty-six thousand one hundred eighty dollars ($86,180.00), and fifty-three dollars

and thirty cents ($53.30) costs; that the plaintiff therein, Charles D. McLure, never at any time caused or requested a writ of execution to be issued out of this Court until on, to wit, the 10th day of January, 1907, two days after the filing of complainant's original petition in intervention therein, nor has he at any time directed or requested said United States Marshal, or any other officer to do anything further in said cause since the service of said writ of attachment as aforesaid, and no further levy has been made or lien acquired since the service of said writ of attachment; that the said defendant has, by his laches and unreasonable delay, waived, abandoned and lost whatever lien he may have had or claims upon said property.

5. That on the 17th day of December, 1901, the complainant herein commenced a certain action in the District Court of the Eighth Judicial District of the State of Montana in and for the county of Cascade, being numbered 3876, on the records of said court against the said Diamond R. Mining Company, a corporation, as defendant, by the filing of a complaint therein; that immediately after the filing of said complaint and the issuance of a summons thereon, this complainant, as plaintiff in said action, also made and filed an affidavit of attachment in due form, as required by section 891 and also furnished and filed an undertaking on attachment in due form, with two sufficient sureties, approved by the Clerk, as required by section 892, of the Code of Civil procedure of the State of Montana and thereupon a writ of attachment was duly issued out of said court in

said cause, and directed to the sheriff of the said county of Cascade, and State of Montana as provided by section 893 of the Code of Civil Procedure of the State of Montana, and the same was thereupon placed in the hands of said sheriff for service, and the said sheriff did duly serve said writ on the 17th day of December, 1901, by levying upon, all and singular, the same and identical real estate and appurtenances aforesaid, including the concentrator building, power-houses and all other buildings situate upon and appurtenant to said real estate, together with all machinery and tools of every kind therein, and as particularly described in said Exhibit "AA," herein referred to, the sheriff of Cascade County making the levy as aforesaid upon said real estate by filing with the county clerk and recorder of said county on said date a copy of the said writ of attachment, together with a description of the said property attached, and a notice that it is attached, all as provided in section 895 of the code of civil procedure of the State of Montana; and the said sheriff making his levy upon all the personal property by taking possession thereof simultaneously with the said United States Marshal, but said possession having been thereafter surrendered by reason of the interference and obstruction of the said marshal, and the said Tripp continued to hold possession of all said property; that after the due service of summons in said cause upon said defendant, a judgment in due course was duly given, made and entered in said cause in favor of the complainant, as plaintiff, and against the said defendant, for

the sum of twenty-five thousand three hundred four dollars and eighty-four cents ($25,304.84), and thirty-seven dollars and seventy cents ($37.70) costs, which judgment was thereupon duly docketed in the office of the clerk of said court; that no part of said judgment has been paid and the whole thereof is still a valid and subsisting indebtedness from the said defendant to the said plaintiff, the complainant herein; that the complainant has been and still is prevented from realizing the fruits of its said judgment by reason of the acts of the defendant, Charles D. McLure, herein complained of.

6. That the said judgment in favor of the complainant and against the said defendant, Diamond R. Mining Company, aside from two claims assigned to the complainant, amounting to three thousand two hundred sixty-one dollars and thirty-seven cents ($3,261.37), was based upon certain promissory notes, given and executed by the defendant company on April 15th, 1900, May 10th, 1900, June 1st, 1900, and June 15th, 1900, all payable on demand in consideration of money advanced by complainant to defendant on said respective dates; that at the time said moneys were so advanced, and during all the times herein stated, one L. S. McLure, brother of the defendant Charles D. McLure, was the general manager and director of the said Diamond R. Mining Company, and in personal charge of its affairs, and ever since the 12th day of June, 1900, has also been the president of said company, and was also, at all the times herein stated, the agent and representative of the defendant herein, Charles D. Mc-

Lure, who was residing in the city of St. Louis, State of Missouri, and said Charles D. McLure was also a director in said company until the 9th day of October, 1900; that said Charles D. McLure and L. S. McLure were, at all the times herein stated and still are, the largest stockholders of said company and owned and controlled, and still own and control, a majority of the capital stock thereof; that during said time the said Diamond R. Mining Company was building and constructing a concentrator at its mine in the town of Neihart, Cascade County, Montana, and that the moneys borrowed from the complainant as aforesaid were requested by the defendant company for the purpose of meeting urgent current expenses of the said defendant in connection with said work; that the complainant refused to loan any money whatsoever to the defendant company except upon the understanding that the said Charles D. McLure would immediately repay the same in preference to any other indebtedness of the said Diamond R. Mining Company and before any of said moneys were so advanced and a part of the consideration therefor, it was so understood and agreed that the said Charles D. McLure would repay the same to the complainant as aforesaid, and fully protect the complainant against any loss or damage as the result of said loans to the said defendant company; that some time subsequent to the advancement of said sums, aggregating twenty thousand dollars ($20,000.00), the petitioner demanded payment thereof from the said Charles D. McLure, and he promised to pay the same but notwithstanding

the aforesaid facts and circumstances, whereby the complainant was led to believe, and did believe, that it would not be obliged to bring suit by attachment or otherwise to enforce the payment of said indebtedness, the complainant knowing at all times that the said Charles D. McLure was the only other large creditor of the defendant company, the said Charles D. McLure did, nevertheless, institute the aforesaid action and, as hereinbefore set forth, levy upon and attach all the property of every kind and character belonging to the said defendant, Diamond R. Mining Company; that the said attachment by the defendant herein, Charles D. McLure, as plaintiff in said cause, was not sought or made in good faith, as stated in his affidavit therefor, but was made and the said action prosecuted and judgment thereafter taken for the express purpose of hindering, delaying and defrauding this complainant and other creditors out of their claims and demands, and the said proceedings will have the effect so intended unless set aside by this court.

7. That a concentrator of one hundred (100) tons daily capacity had been completed by the defendant, Diamond R. Mining Company, on or about the —— day of ———— 1900, for the purpose of concentrating its ores; that said concentrator had been operated successfully and profitably in concentrating the ores of the dump of the mine of the said defendant company, and that said concentrator had been erected for the purpose of concentrating the ores that would thereafter be extracted from the defendant company's said mine and this was so under-

stood by the complainant when it loaned the sums of money aforesaid; that after the completion and successful operation of the said one hundred ton concentrator, the said Charles D. McLure and L. S. McLure, controlling the affairs of the company as aforesaid, proceeded to enlarge said concentrator so as to make the same have a capacity of three hundred tons of ore daily, and which was done at an additional cost and expense of about one hundred thousand ($100,000.00) dollars (most of which was advanced by said Charles D. McLure, one of the defendants herein, and embraces the moneys sued for in the aforementioned action), that the company voted to enlarge said concentrator and to borrow said money under the promise and agreement of said Charles D. McLure that he would consolidate the Broadwater Group of mines, then owned by him, with the mines of said company, but which promise and agreement he has never kept, and there has thereby been a failure of consideration for the notes sued on by said Charles D. McLure, plaintiff in said action; that the said concentrator, after successfully treating the ores on the dump of said company, as aforesaid, was thereafter used by said Charles D. McLure, for his sole benefit in concentrating ores from his said Broadwater Group of mines under a contract of seventy-five (75¢) cents per ton, which was a loss to said company, instead of being used to treat the ores from the company's mine as originally intended; that notwithstanding that the said concentrator was reasonably worth the sum of one hundred seventy-five thousand ($175,000.00) dol-

lars, if the same were to be kept in operation in pursuance of the original plan, and notwithstanding also that the mining claims and property of the defendant company were, taken in connection with the concentrator, then and there reasonably worth the sum of five hundred thousand ($500,000.00) dollars and could have been worked and operated at a profit, all of which was well known to them, the said Charles D. McLure and L. S. McLure, acting in collusion for the purpose of cheating and defrauding the complainant and other creditors, as well as the minority stockholders of the defendant company, closed down the said concentrator and failed and refused to open up the defendant company's mine, and at once instituted the aforesaid action and levied upon and attached all of the defendant company's said property.

8. That on the 9th day of February, 1903, one George F. Bartlett recovered a judgment and decree against the said Diamond R. Mining Company in the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, for the sum of fifteen hundred twenty-nine dollars and ninety cents ($1529.90) and under and by virtue of said judgment, the sheriff of Cascade County, Montana, did, on the 20th day of April, 1904, sell lots numbered 1, 2, 3, and 4 in block numbered 2 in the original townsite of Neihart, Montana, as platted by Frank P. Atkinson, trustee, upon the surface of the Frisco Lode Mining Claim, the said lots embracing the parcel of ground upon which the first part of the defendant company's said concentrator

was erected and the judgment aforesaid, upon which the same was sold, being by virtue of the foreclosure of a mechanic's lien upon the same; that the defendant herein, Charles D. McLure and his brother L. S. McLure, acting collusively and fraudulently as aforesaid, took no steps whatsoever to redeem said property for the company or to protect the interest of the stockholders or creditors thereof, but on the 23d day of March, 1905, the defendant herein, Charles D. McLure, redeemed the said land and premises from said sale for himself by paying to the said sheriff for the purchaser, the sum of nineteen hundred thirty dollars and twenty-five cents ($1930.25), which was then and there due, said defendant effecting said redemption as the owner of the judgment recovered in the aforesaid action in this court; that thereafter, to wit, on the 2d day of January, 1906, upon application of the said defendant, Charles D. McLure, the sheriff executed to him a deed for said land and premises; that by reason of the said foreclosure proceedings instituted by said George F. Bartlett and the sale of the said premises thereunder, and the redemption by the said defendant, Charles D. McLure, the said defendant thereby became vested with the legal title to that portion of the concentrating plant of the defendant company which had originally been constructed at a cost of $75,000.00; that under and by virtue of the provisions of section 1236 of the Code of Civil Procedure of the State of Montana the said defendant, Charles D. McLure, plaintiff in said action, would not have permitted this complainant, or any other

redemptioner, to redeem from him except by paying the amount so paid by the defendant herein as aforesaid, and also the amount of defendant's said judgment, to wit, $86,180.00, with interest thereon from the date thereof; that this prejudice and damage to complainant has resulted because of said defendant's delay and laches in not having execution issued upon his judgment in the aforementioned action.

9. That, as complainant is informed and believes, the plaintiff in said action, Charles D. McLure, one of the defendants herein, and his brother, L. S. McLure, the president and manager of the defendant company, were acting in collusion and in fraud of the rights of the complainant and other creditors of the defendant company when they created the indebtedness for enlarging the concentrator, when they closed down the defendant company's concentrator and failed and refused to open its mines, and when the aforesaid attachment suit of the defendant herein, Charles D. McLure, plaintiff in said action, was instituted and judgment by default taken after service upon said L. S. McLure, and also when they delayed for five years to take any steps whatever to sell the property held under said attachment, leaving this property during all said time in the custody of their said employee, John L. Tripp; that they also acted in collusion and with the same fraudulent purpose and design in making no reasonable effort to pay the said claim of George F. Bartlett and in permitting the sale of said land and premises to satisfy his said judgment, and in effecting the redemption of said property in the manner aforesaid,

to the great damage, loss and injury of this complainant and other creditors as well as the minority stockholders of the defendant company; that by reason of all the acts aforesaid, the said attachment lien and also the judgment in said cause should be held fraudulent and void as to this complainant.

10. That, as hereinabove set forth, the property attached in said cause consists of the defendant company's mines, and also the flumes, pipes, cars, blacksmith-shop, concentrating-mill and other machinery and tools used in working the same; that the value of the same, owing to its peculiar nature, is dependent upon its being kept together and used and operated as one plant; that while the said property and the different portions thereof had the values hereinbefore mentioned at the time of said defendant's said attachment on the 16th day of December, 1901, yet owing to the fact now that said defendant has, in the manner hereinbefore set forth, acquired the legal title to a portion of the concentrating plant, the remaining portion thereof has necessarily depreciated in value in a sum far greater than the value of the portion thus segregated; that since said attachment, said defendant, Charles D. McLure, by keeping said John L. Tripp in the possession and control of said property, both real and personal, under said attachment, has deprived the said Diamond R. Mining Company and its stockholders of the possession, use and enjoyment of all said property, and its mines have suffered great and irreparable damage and injury by disuse and neglect during said period of time; that there has also been a

natural depreciation in value of the portion of the concentrating plant remaining, and all the machinery and tools connected therewith, since said attachment; that the defendant company is insolvent and that all said attached property is not now of sufficient value to more than satisfy defendant's said judgment; that the excessive attachment made in said action, and especially when taken in connection with the property acquired by defendant, Charles D. McLure, by virtue of his redemption, as a judgment creditor, should and does, in fact, amount to a satisfaction of his said judgment therein; that in any event, even though a valid lien were obtained in the first instance by said defendant under his said attachment, and even though the judgment of said defendant should not be deemed satisfied by reason of his acts as aforesaid, nevertheless the said defendant, Charles D. McLure has been guilty of such unreasonable delay and laches in failing to have a levy and sale made under execution upon said judgment, as to constitute a waiver and abandonment of his said pretended lien, and that the same should in equity be postponed and subordinated to the attachment lien of the complainant as hereinbefore set forth.

11. That the complainant, with leave of Court, filed its petition in intervention in the aforementioned cause on the 8th day of January, 1907; that, thereafter, to wit, on the 10th day of January, 1907, the plaintiff in said action, Charles D. McLure, one of the defendants herein, caused a writ of execution to be issued out of this court upon his said judgment, including also $——— costs, claimed as keeper's

charges, but nothing has been done thereunder; that on the 12th day of January, 1907, complainant caused a writ of execution to be issued out of the State Court upon its said judgment, and delivered same to the sheriff of Cascade County for service; that in pursuance thereof, said sheriff levied upon all the personal property of the defendant by delivering a copy of said writ of execution, together with a notice to said John L. Tripp, who was then and there in possession and control of the same, stating that all personal property in his possession and under his control belonging to the defendant company was attached in pursuance of said writ as provided by section 895 of the Code of Civil Procedure of Montana; that said sheriff is unable to proceed further with the service of said writ of execution on account of the pretended lien of the said defendant, Charles D. McLure, upon said property; that on the —— day of January, 1907, the complainant herein, with leave of Court, filed in this court its amended and supplemental petition in intervention in the aforementioned action, setting forth the facts substantially as above, and thereafter, to wit, on the 2d day of February, 1907, on motion of the plaintiff in said cause, Charles D. McLure, one of the defendants herein, the said amended and supplemental petition was by the Court dismissed; that the complainant has no plain, speedy or adequate remedy at law, and is relievable only in a court of equity; that if a sale is had of said property under the said writ of execution issued out of this court, in the said action of Charles D. McLure, plaintiff, vs. Diamond

R. Mining Company, defendant, and a certificate of sale or deed is issued to the purchaser at said sale, the same will constitute a cloud upon the title to said property and the rights of the complainant thereto and will cause great and irreparable injury to the complainant and all other creditors similarly situated.

12. That on account of the attachment sought to be made by said defendant, Charles D. McLure, as plaintiff in said action, through the writ issued out of this court in said cause, and on account of the writ of execution issued out of this court on the 10th day of January, 1907, after the filing of complainant's original petition in intervention in said cause, whereby the plaintiff therein, Charles D. McLure, defendant herein, is threatening to sell all of said property, and in order to prevent any conflict between this court and the State Court over the controversy involved herein, the complainant comes into this court with its bill of complaint and asks the permission of this court to proceed under its execution issued upon its said judgment in the State Court and levy upon and sell all the property of the said defendant company, or so much thereof as may be necessary to satisfy its demand; that if the defendant, Charles D. McLure, is permitted to levy upon and sell said property under execution great and irreparable damage will be done complainant and other creditors of the defendant company.

In consideration whereof, and for as much as complainant is without full and adequate remedy in any other court and is relievable only in this court,

where alone the wrong done, as well as the injury threatened, may be remedied or prevented, the complainant prays that upon consideration of this its bill of complaint, it may please the Court and your Honors to permit the complainant, or the proper officer, to take possession of and sell all the said described property of the defendant company under its execution, or so much thereof as may be necessary to satisfy complainant's judgment aforesaid; that the Court may order, adjudge and decree that complainant has a first and prior lien upon all said property, and that the attachment, or pretended attachment, made in said cause of Charles D. McLure, plaintiff, vs. Diamond R. Mining Company, defendant, hereinbefore mentioned, is null and void and of no effect, or in any event has become lost and abandoned; that the judgment entered therein is void as to this complainant, or in any event has become satisfied; that the writ of execution therein be withheld; that the defendants herein, their officers, agents and servants, be restrained and enjoined from selling or disposing of in any manner whatsoever, under the said writ of execution issued in the above-mentioned action, any of the property herein described and set forth; and for such other and further relief as to the Court may seem meet and equitable.

A. C. GORMLEY,

Solicitor for Complainant.

(Complaint duly verified by R. S. Ford, as president of plaintiff Great Falls National Bank.)

EXHIBIT "AA" (to Above Bill of Complaint).

United States Marshal's Office,
District of Montana.

I do hereby certify that I have received the hereto annexed writ of attachment on the 14th day of December, A. D. 1901, and on the 16th day of December, 1901, at 9 o'clock A. M. executed the same by levying upon and attaching certain real estate hereinafter referred to, standing upon the records of Cascade County, State of Montana, in the name of the defendant mentioned in said writ, by filing with the county clerk of said county of Cascade, a copy of said writ together with a notice that said property was attached, a copy of which notice is hereby attached and marked Exhibit "A" and by taking into my custody, at two o'clock and twenty minutes P. M. of the 18th day of December, A. D. 1901, the following described personal property belonging to said defendant, and then and now situated and being in said Cascade County, to wit:

(Here follows list of personal property.)

EXHIBIT "A" (to Marshal's Return).

One-third interest in the Compromise Quartz Lode Mining Claim, Patent No. 1964.

The Moulton Quartz Lode Mining Claim, Patent No. 2471.

The South Carolina Quartz Lode Mining Claim, Patent No. 3253 (The Unity Quartz Lode Mining Claim, Patent No. 3253, all situated in Cascade County, Montana).

Lots 1, 2, 3, 4, 5 and 15 of Block 2, of the Frisco Claim, lots 1, 2, 3, 4, 5, 12, 13, 14, and 15, Block No. 3 of the Frisco Claim.

Lots 1 and 2, 34, 35 and 36 of Block 6 of the Frisco Claim.

Certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for Concentrator site.

Two water rights on Belt Creek.

The tramway and rights of way for the same, between Moulton mine and Concentrator building.

The water flume and right of way for same.

The quartz location known as Belt No. 2. Concentrator building, power-house, and buildings at mine, and all machinery in all of the buildings aforesaid, including engines, hoists, etc., etc.

Office and household furniture, supplies and moneys and credits on hand.

Exhibit "C" [to Bill of Complaint].

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

The State of Montana, to the Sheriff of Said County of Cascade, Greeting:

Whereas, on the 12th day of February, A. D. 1902, Great Falls National Bank recovered a judgment in the said District Court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, against Diamond R. Mining Company for the sum of twenty-five thousand three hundred

four & 84/100 dollars damages, with interest thereon at the rate of eight per cent per annum till paid; together with their costs and disbursements at the date of said judgment, and accruing costs amounting to the sum of thirty-seven and 70/100 dollars as appears to us of record.

And whereas, the judgment-roll in the action in which said judgment was entered, is filed in the clerk's office of said court, in the County of Cascade, and the said judgment was docketed in said clerk's office, in the said county, on the day and year first above written, and the sum of $25,342.54, with interest, and $1.00 accruing costs is now (at the date of this writ) actually due on said judgment.

Now, you, the said sheriff, are hereby required to make the said sum due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment out of the personal property of the said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to said debtor, on the day whereon said judgment was docketed in the said county, or at any time thereafter, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

Witness the Hon. J. B. LESLIE, Judge of the said Eighth Judicial District of the State of Montana, at the Courthouse in the county of Cascade, this 7th day of October, A. D. 1908. Attest my hand and

the seal of said Court, the day and year last above written.

[Seal] C. C. PROCTOR,
Clerk.
By F. G. Woodworth,
Deputy Clerk.

Exhibit "D" [to Bill of Complaint].

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

The State of Montana, to the Sheriff of Said County of Cascade, Greeting:

Whereas, on the 17th day of December, 1904, The American Engineering Works recovered a judgment on the said District Court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, against Diamond R. Mining Company for the sum of Four Hundred thirty-three and 27/100 dollars damages, with interest thereon at the rate of eight per cent per annum till paid; together with their costs and disbursements at the date of said judgment, and accruing costs amounting to the sum of eight and 50/100 dollars as appears to us of record.

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the county of Cascade, and the said judgment was docketed in said clerk's office in the said county on the day and year first above written, and the sum of $441.77, with interest and $1.00 accruing costs, is now (at the date of this writ) actually due on said judgment.

Now, you the said sheriff, are hereby required to make the said sum due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the personal property of the said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to said debtor, on the day whereon said judgment was docketed in the said county, or at any time thereafter, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

Witness: The Hon. J. B. LESLIE, Judge of the said Eighth Judicial District of the State of Montana, at the Courthouse in the county of Cascade, this 12 day of Nov., A. D. 1908.

Attest my hand and the seal of said court, the day and year last above written.

C. C. PROCTOR,
Clerk.

By F. G. Woodworth,
Deputy Clerk.

[Endorsed]: Title of Court and Cause. Bill of Complaint. Filed and Entered December 3, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 3d day of December, 1908, a subpoena in equity was duly issued herein, in the words and figures following, to wit:

[Subpoena.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To the Great Falls National Bank, a Corporation, American Engineering Works, a Corporation, and Ed. Hogan, as Sheriff of Cascade County, State of Montana, Defendants.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid at the courtroom in Helena, Montana, on the 4th day of January, A. D., 1909, to answer a Bill of Complaint exhibited against you in said court by Charles D. McLure, Complainant, who is a citizen of the State of Missouri, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 3d day of December, in the year of our Lord one thousand

nine hundred and eight, and of our Independence the 133d.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of January next, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

WIGHT & PEW,
Solicitors for Complainant, Helena, Montana.

United States of America,
District of Montana,—ss.

I hereby certify and return that I received the within subpoena in equity on the 3d day of December, 1908, and that on the same day I served the said Subpoena in Equity on the therein named Great Falls National Bank by delivering to and leaving with R. S. Ford, its President, a true copy thereof; and upon the American Engineering Works by delivering to and leaving with Richard Bennett, its agent and representative, a true copy thereof; and

upon Ed. Hogan, Sheriff of Cascade County, Montana, personally, by delivering to and leaving with him a true copy thereof; all at Great Falls, in Cascade County, Montana.

Dated this 4th day of December, 1908.

ARTHUR W. MERRIFIELD,
United States Marshal.
By Harry Drumm,
Deputy.

[Endorsed]: No. 892. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. Chas. D. McLure vs. Great Falls Natl. Bank et al. Subpoena. Filed Dec. 4th, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 1st day of February, 1909, a stipulation was filed herein, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,
Complainant,

vs.

THE GREAT FALLS NATIONAL BANK et al.,
Defendants.

Stipulation [as to Pleadings].

It is hereby stipulated between the respective parties hereto, that upon the defendants herein dismissing their bill of complaint filed in this court against the above plaintiff, Charles D. McLure, and the

United States Marshal, that the amended answer and cross-bill of the above-named defendants may be filed herein.

It is further stipulated that complainant consents that said cross-bill as now drafted as a part of said amended answer may be considered as fully as though the same were filed as a separate pleading, and properly alleged the original bill and properly prayed for process, and complainant expressly waives any and all formal objections based upon the above defects.

It being further stipulated that the setting for hearing on bill and answer shall apply to the answer as amended; and that plaintiff's demurrer to the cross-bill (hereafter to be filed) shall be heard at the same time, if filed at or before such hearing.

WIGHT & PEW,
Solicitors for Complainant.

A. C. GORMLEY,
CLAYBERG & HORSKY,
Solicitors for Defendants.

Dated January 30, 1909.

[Endorsed]: Title of Court and Cause. Stipulation. Filed Feb. 1st, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 1st day of February, 1909, the Amended Answer and Cross-bill of defendants was filed herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,

Complainant,

vs.

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana,

Defendants.

Amended Answer and Cross-bill.

Come now the defendants in the above-entitled action, and file this, their amended answer herein as follows, to wit:

First: Admit the allegations contained in paragraphs 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14; 15 and 17 of said bill of complaint.

Second: Admit the allegations contained in paragraph 5, save and except the allegations that the United States Marshal levied upon all of the personal property, and all of the real property of the said Diamond R. Mining Company, which allegations defendants deny; admit the allegations contained in paragraphs 7 and 8 of said bill of complaint, save

and except the allegation that the said United States Marshal, advertised for sale, levied upon and sold all of the real and personal property of the said Diamond R. Mining Company, which allegation, defendants deny, and they allege that the said United States Marshal never at any time levied upon, or advertised for sale or sold the ore bins blacksmith's shop, a portion of the power house, or tramway, all of which were and are personal property, nor did he at any time levy upon, advertise for sale or sell the Equator Quartz Lode Mining Claim, which was, and is a patented mining claim, being survey No. 3020.

Third: Deny the allegations contained in paragraph 16 of said bill of complaint.

Fourth: Admit, that on the 20th day of November, 1908, the defendant, Ed Hogan, as sheriff of Cascade County, Montana, made a sale of the ore bins, tramway, blacksmith's shop, and a portion of said power house, to the Great Falls National Bank, one of the defendants herein, and admit that said sheriff had given notice that he would sell the said Equator Quartz Lode Mining Claim, as alleged in paragraph 18 of said bill of complaint, but deny all the other allegations of said paragraph 18.

Fifth: Deny the allegations of paragraphs 19 and 20 of said bill of complaint.

Sixth: Further answering said bill of complaint, defendants allege that the property aforesaid, which is set forth in paragraph 18 of said bill of complaint, should not have been included in the list of property, described in the marshal's certificate of sale, being exhibit "A" of said bill of complaint, or in the mar-

shal's deed thereafter executed, for the reason that the same was never levied upon or advertised for sale or sold, and that the complainant has never acquired any right, title or interest in and to any of said property, as will more fully appear by the return of the said marshal on the writ of execution, issued out of this court on complainant's judgment, a copy of which return (save and except a description of certain personal property not involved in this action) is hereto attached, marked exhibit "AA" and made a part of this amended answer.

Seventh: Further answering, defendants allege that the defendant, Great Falls National Bank had a first and prior levy and attachment upon all of said property, mentioned in said paragraph 16 which was had and obtained by the said sheriff of Cascade County, taking the said personal property into his custody and possession, and by filing a notice with the Clerk and Recorder of said Cascade County on the 17th day of December, 1901, to the effect that he had levied upon and attached the said Equator Quartz Lode Mining Claim, all in pursuance of the writ of attachment, issued out of said court on said judgment of said Great Falls National Bank against said Diamond R. Mining Company, and defendants allege further, that in selling and advertising for sale the said described property, they were acting in pursuance of the writs of execution, issued out of said court on the said judgments of the Great Falls National Bank and the American Engineering Works against the said Diamond R. Mining Company, as they had a lawful right to do.

For a Separate Defense to Complainant's Bill of Complaint, and as a Cross-bill of Complaint Herein, Defendants Allege:

First: That the defendant, the Great Falls National Bank, is a corporation duly organized and existing under and by virtue of the National Banking laws of the United States, and doing business as such in the city of Great Falls, Cascade County and State of Montana.

Second: That on the 17th day of December, 1901, the defendant herein, Great Falls National Bank, commenced a certain action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, being numbered 3876 on the records of said court, against the Diamond R. Mining Company, a corporation, as defendant, by the filing of a complaint herein; that immediately after the filing of said complaint, and the issuance of a summons thereon, said Great Falls National Bank, a plaintiff in said action, also made and filed an affidavit of attachment in due form as required by section 891 of the Code of Civil Procedure of the State of Montana, and also furnished and filed an undertaking on attachment in due form, with two sufficient sureties, approved by the clerk, as required by section 892 of the Code of Civil Procedure, and thereupon a writ of attachment was duly issued out of said court in said action, and directed to the sheriff of said County of Cascade and State of Montana, as provided by section 893 thereof, and the same was thereupon placed in the hands of the said sheriff for service, and the said sheriff did on the 17th day of

December, 1901, duly serve said writ of attachment, by levying upon and attaching all and singular the property of every kind and character, both real and personal, belonging to the said defendant, Diamond R. Mining Company, the said sheriff making the aforesaid levy upon said real estate of said defendant by filing with the County Clerk and Recorder of said County on said date a copy of said writ of attachment, together with a description of said property attached, and a notice that it was attached, all as provided by section 895 of the Code of Civil Procedure of the State of Montana; that a full and complete description of the said real estate belonging to said Diamond R. Mining Company, and so levied upon and attached by the complainant, is as set forth in the Marshal's certificate of sale attached to complainant's bill of complaint, and referred to as Exhibit "A" and hereby made a part hereof; that after the due service of summons in said cause upon said defendant, a judgment in due course was, on the 12th day of February, duly given, made and entered in said cause in favor of the said Great Falls National Bank as plaintiff and against the said Diamond R. Mining Company as defendant, for the sum of $25,304.84 and $37.70 costs, which judgment was thereupon duly docketed in the office of the Clerk of said Court; that no part of said judgment has been paid, and the whole thereof is still a valid and subsisting indebtedness from the said Diamond R. Mining Company to the said bank, defendant herein.

Third: That on the 14th day of December, 1901, the complainant, Charles D. McClure, then and now

a nonresident of the State of Montana, and then and now a resident and citizen of the State of Missouri, instituted an action in this court in the city of Helena, County of Lewis and Clark and State of Montana, as plaintiff, against the above-named Diamond R. Mining Company as defendant, and on said date there was issued out of said court a writ of attachment in said cause, directed and delivered to the United States Marshal for the District of Montana for service; that in pursuance of said writ of attachment said United States Marshal filed a notice of attachment with the County Clerk and Recorder of the County of Cascade and State of Montana, upon the 16th day of December, 1901, thereby levying upon certain real estate in said Cascade County, Montana, belonging to said Diamond R. Mining Company, and described in said notice, the return of said Marshal on said writ of attachment, containing a full and correct description of the said property levied upon, being hereto attached, marked Exhibit "AA" and made a part hereof; that the United States Marshal also levied upon and attached all the personal property of the said defendant, Diamond R. Mining Company, under said writ of attachment; that summons in said action was served upon L. S. McLure as President of the said Diamond R. Mining Company, and on the 16th day of January, 1902, a judgment by default was entered in said cause in the city of Helena, Lewis and Clark County, Montana, in favor of the said Charles D. McLure as plaintiff, and against the Diamond R. Mining Company as defendant, for the sum of $86,180.00 and $53.30 costs.

Fourth: That the said Charles D. McLure never at any time caused or requested a writ of execution to be issued out of this Court on said judgment until on, to wit: the 10th day of January, 1907, upon which date a writ of execution was issued out of this Court on said judgment, and was delivered to A. W. Merrifield, United States Marshal for the District of Montana, for service; that the said United States Marshal did proceed with the service of said writ by advertising for sale all the real estate and personal property theretofore attached in said action as aforesaid, the notice of sale being published in the "Great Falls Daily Tribune" on the 3d, 10th, 17th and 24th days of February, 1907, and in no other manner, a copy of which notice of sale is attached to the said Marshal's return on said writ of execution hereinbefore referred to, marked Exhibit "AA" and made a part hereof; that all of the real estate so levied upon and advertised for sale was on the 26th day of February, 1907, sold by the said United States Marshal to the said Charles D. McLure, who thereupon received from said United States Marshal a certificate of sale, which is Complainant's Exhibit "A" aforesaid and made a part hereof; that thereafter, to wit, on the 27th day of February, 1908, the said United States Marshal made, executed and delivered to said Charles D. McLure his deed of said real property, as described in said certificate of sale, and the same was on the 28th day of February, 1908, duly recorded in the office of the Clerk and Recorder of said Cascade County, Montana.

Fifth: That on the 7th day of October, 1908, the defendant herein, Great Falls National Bank, after leave and upon the order of said court in which it had recovered judgment as aforesaid, caused a writ of execution to be issued out of the office of the Clerk of said Court upon its said judgment, which said writ was directed and delivered to the sheriff of Cascade County, Montana for service; that, in pursuance of said writ of execution, the said sheriff did thereupon again levy upon the Equator Quartz Lode Mining Claim, survey No. 3020, being a patented mining claim, in Montana (unorganized) mining district, Cascade County, Montana, by filing a notice of his levy upon said described property, with a copy of said writ of execution, with the Clerk and Recorder of said Cascade County, Montana (being part of the same property specifically levied upon by the sheriff of said County, under the writ of attachment issued in said cause as hereinbefore referred to), and said sheriff did proceed to advertise all the right, title and interest of the said Diamond R. Mining Company in and to said Equator Quartz Lode Mining Claim, for sale on the 4th day of December, 1908, under said writ of execution; that on the 3d day of December, 1908, the said sheriff was restrained from proceeding with said sale by an order issued out of this Court in this action; that thereafter, to wit: on the 11th day of December, 1908, on application of said Charles D. McLure, a preliminary injunction was granted by this court in this action, whereby the said defendants herein, were enjoined

from selling said property, or proceeding further under said writ of execution.

Sixth: That on the 6th day of August, 1902, the defendant herein, American Engineering Works, a corporation, organized and existing under the laws of the State of West Virginia, commenced a certain action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, being No. 4009, against the said Diamond R. Mining Company, a corporation, as defendant, and thereafter, to wit, on the 17th day of December, 1904, a judgment was duly given, made and entered in said court in said cause in favor of said American Engineering Works as plaintiff, and against the said Diamond R. Mining Company for the sum of $441.77; that said judgment was duly docketed in the office of the clerk of said court, and thereby became a lien upon all said company's real estate in said Cascade County; that no part of said judgment has been paid and the whole thereof is still a valid and subsisting indebtedness from the said company to the said American Engineering Works.

Seventh: That on the 12th day of November, 1908, the defendant, American Engineering Works, caused a writ of execution to be issued out of the office of the Clerk of said Court upon its said judgment, which said writ was directed and delivered to the sheriff of Cascade County, Montana, for service; that said sheriff did proceed to advertise all the right, title and interest of the said Diamond R. Mining Company, in and to said Equator Quartz Lode Mining Claim, for sale on the 4th day of December, 1908,

under said writ of execution, but that the said sheriff and the defendants were restrained and enjoined from proceeding with said sale by reason of the restraining order and preliminary injunction issued out of this Court as hereinbefore set forth.

Eighth: Defendants aver that the said certificate of sale and the said deed executed by the said A. W. Merrifield, as United States Marshal aforesaid, to the said Charles D. McLure, are, and each of them is, null and void so far as passing any title whatsoever to said McLure in or to said Equator Quartz Lode Mining Claim, is concerned, for the reason that no levy was made thereon under the writ of attachment or the writ of execution in said action of Charles D. McLure vs. Diamond R. Mining Company, and for the further reason that the said Equator Lode was not advertised or noticed or offered for sale by the said Marshal, nor was the same sold by the said Marshal, and the inclusion of said Equator Lode in the property described in said certificate of sale and the said Marshal's deed was therefore a nullity.

Ninth: Defendants further aver that the said certificate of sale and the said marshal's deed are, and each of them is, null and void in toto, and that the same and the pretended sale mentioned therein, should be set aside and held for naught, for the following reasons: (a) The said sale was of real property, consisting of several known lots or parcels, including mining claims, town lots, etc., which should have been sold separately as provided by section 1227 of the Code of Civil Procedure of the State of Montana, and which would have been the best and most advan-

tageous way of selling said property, whereas all of said real estate (except the Belt No. 2 Quartz Lode Mining Claim, which was not the property of said defendant) was sold in one lot, contrary to the provisions of said statute, and to the damage and prejudice of said Diamond R. Mining Company and of these defendants, as judgment creditors and redemptioners. (b) The said notice or advertisement of said sale, as hereinabove set forth, was published only on the 3d, 10th, 17th and 24th days of February, 1907, in the issues of that date in the "Great Falls Daily Tribune," a newspaper printed and published daily in the city of Great Falls, Cascade County, Montana, all of said publications being on Sunday, and being therefore null and void.

Tenth: That the said judgment of said complainant, Charles D. McLure, in said case so brought and prosecuted in this court against the Diamond R. Mining Company, as in this cross-bill alleged, never became a lien upon said Equator Quartz Lode Mining Claim, but in any event such pretended lien was subject to the attachment lien of the defendant, Great Falls National Bank, duly levied thereon in its suit as plaintiff against the Diamond R. Mining Company as defendant, as hereinbefore alleged, at a time when the said defendant, C. D. McLure, had no lien of any kind upon said Equator Quartz Lode Mining Claim; that such pretended lien of said McLure was also subject to the lien of said American Engineering Works, and also became entirely lost by the acts of said McLure as hereinbefore alleged.

Eleventh: That the purpose of this suit is to procure relief from this court by its decree deciding and determining that said Great Falls National Bank's attachment duly created and levied, as herein alleged, upon the Equator Quartz Lode Mining Claim, is prior in point of time and superior in law to any lien of the complainant, Charles D. McLure; determining and deciding that the said Charles D. McLure acquired no rights in, to or upon the said Equator Quartz Lode Mining Claim, or any part thereof, by the proceedings taken in his behalf in his suit against the Diamond R. Mining Company, as herein alleged, or by the sale made by the said A. W. Merrifield, as marshal of this court, to the said Charles D. McLure, as herein alleged, or by the certificate of said sale given by the said A. W. Merrifield, as marshal of this court, to the said Charles D. McLure, or by the deed from said A. W. Merrifield, as marshal of this court, to the said Charles D. McLure, as herein fully alleged.

Twelfth: That the amount involved in this suit is in excess of the sum of $2,000, to wit, the value of the Equator Quartz Lode Mining Claim, with the appurtenances and other property upon which no attachment or execution was ever levied in the suit of Charles D. McLure vs. Diamond R. Mining Company heretofore pending in this court as hereinbefore in this cross-bill alleged.

Thirteen: Defendants aver that the said Diamond R. Mining Company has not now, nor has it ever had, any other property of any kind than that above described out of which defendants might satisfy

their said judgments, or either of them, in whole or in part; that the said certificate of sale and marshal's deed cast a cloud upon the title of said property and upon the defendants' liens thereon; that defendants have no plain, speedy or adequate remedy at law, and are relievable only in a court of equity.

Forasmuch as defendants, under their cross-bill of complaint herein, can have no plain, speedy or adequate remedy except in this court and to the end, therefore, that the complainant may, if he can show why defendants, your orators, should not have the relief herein prayed for, make a full disclosure and discovery of all the matters aforesaid according to the best and utmost of his knowledge, remembrance, information and belief, and a full, true and perfect answer make to the matters hereinbefore alleged, but not under oath, an answer under oath being hereby expressly waived, your orators, the defendants, pray this Honorable Court for a decree deciding and determining that the attachment lien of the said Great Falls National Bank, duly created and levied, as hereinbefore alleged, upon the Equator Quartz Lode Mining Claim, and also the judgment lien of the American Engineering Works, are prior in time and superior in law and equity to any lien of the said Charles D. McLure, deciding and determining that the said Charles D. McLure acquired no rights in or to and no lien upon the said Equator Quartz Lode Mining Claim by the proceedings taken in his behalf in the suit of Charles D. McLure against the Diamond R. Mining Company

as hereinbefore alleged, or by the sale made by the said A. W. Merrifield as marshal of this court, in said suit, to the said Charles D. McLure, or by the certificate of said sale issued thereon by the said A. W. Merrifield, as marshal of this court, to the said Charles D. McLure, or by the deed of the said A. W. Merrifield as marshal of this court to the said Charles D. McLure, except subject and subservient to the liens and attachment of your orators, the defendants, upon the said Equator Quartz Lode Mining Claim, as hereinbefore alleged; deciding and determining that the said certificate of sale and said deed executed by the said A. W. Merrifield, as marshal of this court, be set aside and held for naught in so far as the same refers and applies to the said Equator Quartz Lode Mining Claim and your orators; that the said Charles D. McLure be charged and decreed to have no right, title or interest in and to the said Equator Quartz Lode Mining Claim, or any part thereof, except subject and subservient to the rights and liens of your orators, the defendants, and that your orators and each of them have such other and further relief as to the court may seem meet and equitable.

A. C. GORMLEY,
Solicitor for Defendants.

State of Montana,
County of Cascade,—ss.

R. S. Ford, being first duly sworn, deposes and says that he is the president of the Great Falls National Bank, a corporation organized and existing

under and by virtue of the National Banking laws of the United States, one of the defendants herein, and he makes this verification for and on their behalf; that he has read the foregoing amended answer and cross-bill of complaint and knows the contents thereof, and that the matters and things herein stated are true as he verily believes.

R. S. FORD.

Subscribed and sworn to before me this 23d day of January, 1909.

[Seal] RICHARD BENNETT,

Notary Public for the State of Montana, in and for the County of Cascade.

Exhibit "AA" [to Amended Answer and Cross-bill].

COPY OF U. S. MARSHAL'S RETURN ON WRIT OF EXECUTION IN THE CASE OF CHARLES D. McLURE vs. DIAMOND R. MINING COMPANY.

United States of America,
District of Montana,—ss.

I hereby certify and return that I received the execution to which this return is attached on the 31st day of January, A. D. 1907, and that I executed the same as follows, to wit:

On the first day of February, A. D. 1907, at Neihart, Cascade County, Montana, under and by virtue of said writ of execution I levied upon certain real estate standing upon the records of Cascade County, State of Montana, in the name of the defendant mentioned in said writ, and in the possession of the U. S. Marshal of Montana by virtue of an attach-

ment theretofore on the 16th day of December, 1901, levied, which said real estate is particularly described in the notice hereto attached marked exhibit "A," and which notice I posted, filed and advertised as follows on the first day of February, A. D. 1907, one copy thereof I posted upon the front of the office building of said execution defendant, one copy upon the bulletin board of the U. S. postoffice, one copy upon front of concentrator building of said execution defendant, and one copy upon the front of the mine building on the Moulton Mining Claim belonging to said execution defendant, all in public places at Neihart, Cascade County, Montana; one copy thereof I filed in the office of the County Clerk and Recorder of said Cascade County, on the second day of February, A. D. 1907, and on the said day I procured said notice to be published in the "Great Falls Tribune," the affidavit of which publication is hereto attached.

On the 18th day of February, A. D. 1907, at Neihart, Cascade County, Montana, I levied upon certain personal property of the execution defendant, which personal property is mentioned in the notice of Marshal's sale hereto attached, marked Exhibit "B" and more particularly described and listed as personal property sold at Marshal's sale in the list hereto attached marked Exhibit "C"; which notice of sale marked Exhibit "B" I posted on the said 18th day of February, A. D. 1907, as follows, to wit, one copy thereof on the outside front of the office building of execution defendant, one copy upon the bulletin board of the U. S. postoffice, and one copy

upon the outside front of the mine building of execution defendant's Moulton Mine, all in public and conspicuous places at Neihart, Cascade County, Montana.

On the 26th day of February, A. D. 1907, at ten o'clock A. M. of said day, I sold at public vendue to the highest bidder, for cash, the said personal property so described, listed and advertised as per exhibits "B" and "C" hereto attached, to Charles D. McLure, the execution creditor named in said execution, he being the highest bidder, in lots and for the sum entered in said exhibit "C," amounting in whole to the sum of $778.00.

The sale of said goods and chattels not being sufficient to satisfy said execution, I did at eleven o'clock A. M. of said 26th day of February, A. D. 1907, at Neihart, Cascade County, Montana, on the premises of the said Diamond R. Mining Company offer for sale at public vendue to the highest bidder for cash the real estate described in said notice of sale of real estate hereto attached and marked Exhibit "A" and thus sold the same and the whole thereof, in two lots as follows: Lot No. 1—The Belt No. 2 Quartz Lode Mining Claim.

Charles D. McLure being the highest bidder therefor, I sold said Belt No. 2 Quartz Lode Mining Claim to the said Charles D. McLure for $100.00.

Lot No. 2 being all the rest, residue and remainder of the said real estate so levied upon and advertised for sale together with the tenements, hereditaments, fixtures and appurtenances thereunto belonging or appertaining as described in said

Marshal's notice of sale of real estate hereto attached referred to and designated as Exhibit "A," and the deeds and records therein referred to, I then and there exposed and offered for sale at public vendue to the highest bidder for cash, in one lot as aforesaid, having been required to thus expose and sell the same by written request of said execution defendant Diamond R. Mining Company by W. P. Wren, Secretary thereof, and consented to in writing by Charles D. McLure, execution creditor, which written request is hereto attached and marked Exhibit "D" and thus sold the same to Charles D. McLure for $120,000.00, that amount being the highest bid therefor and the bid of Charles D. McLure.

That I thus sold the said personal property for the sum of $778.00, and said real estate for the sum of $120,100.00, being paid in total, $120,878.00.

That at the time and place of the said sale of real property, viz.: at eleven o'clock A. M. of the said 26th day of February, A. D. 1907, at Neihart, in Cascade County, Montana, on the premises of said Diamond R. Mining Company, when I offered for sale the last lot, viz: Lot sale No. 2 of real estate, I was orally notified by Ira T. Wight, counsel for Charles D. McLure, the execution creditor, that Lots No. 1, 2, 3 and 4 in Block No. 2 of the Frisco Claim, being a part of the real estate so levied upon, advertised and then and there offered for sale in sale Lot No. 2, had theretofore been sold under execution of one G. F. Bartlett and Sheriff's deed given therefor; whereupon I announced that only such interest if any as the execution defendant holds therein at

the date of this levy and sale is here offered for sale or sold.

The full amount of judgment, interest and costs as computed by me is as follows:

Jan. 16, 1902, Judgment	$86,180.00
Costs	53.30
	$86,233.30
Int. on same to February 26, 1907, at 8%	35,259.82
Jan. 26, 1904, Marshal's costs	3,846.00
Int. on same to Feb. 26, 1907	948.68
Feb. 26, 1907, Marshal's fees, expenses, levy and sale	681.19
Cost publishing notice of sale	16.20
Clerk's cost issue and return execution	2.50
	$126,987.68

The amount received for said property at said sale, as above stated, was the sum of $120,987.00 and was disbursed by me as follows:

Total amount for which property sold		$120,878.00
Paid U. S. Marshal's fees and expenses	$ 681.19	
Cost publishing notice of sale	16.20	
Paid cost Clerk issue and return execution	2.50	
Paid Judgment creditor, Charles D. McLure	120,178.00	
		$120,878.00

Dated this 26th day of February, A. D. 1907.

ARTHUR W. MERRIFIELD,
U. S. Marshal.
By Scott N. Sanford,
Deputy.

Exhibit "A" [to Amended Answer and Cross-bill].

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,
Plaintiff,

vs.

DIAMOND R. MINING COMPANY (a Corporation),
Defendant.

To be sold at Marshal's sale on the 26th day of February, A. D. 1907, at the hour of 11 o'clock A. M., at Neihart, Cascade County, Montana, on the premises of the said Diamond R. Mining Company:

One-third interest in the Compromise Quartz Lode Mining Claim; Patent No. 1964.

The Moulton Quartz Lode Mining Claim, Patent No. 2471.

The South Caroline Quartz Lode Mining Claim Patent No. 3153.

The Unity Quartz Lode Mining Claim, Patent No. 3253.

(All situate in Cascade County, Montana.)

Lots 1, 2, 3, 4, 5 and 15 of Block No. 2 of the Frisco Claim.

Lots 1, 2, 3, 4, 5, 12, 13, 14 and 15, Block No. 3, of the Frisco Claim.

Lots 1 and 2 of Block No. 5 of the Frisco Claim.

Lots 1 and 2, 34, 35 and 36 of Block No. 6 of the Frisco Claim.

Certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for concentrator site.

The two water rights on Belt Creek.

The tramway and rights of way for same, between Moulton Mine and concentrator building.

The water flume and the rights of way for same.

The quartz location known as Belt No. 2.

Concentrator building, power-house and buildings at mines, and all machinery in all the buildings aforesaid, including engines, hoists, etc., etc.

Together with all fixtures and appurtenances thereunto belonging, all situated in Cascade County, Montana.

Dated this 2d day of February, 1907.

ARTHUR W. MERRIFIELD,
United States Marshal for the District of Montana.

Exhibit "B" [to Amended Answer and Cross-bill].

United States of America,
District of Montana,—ss.

Public notice is hereby given that by virtue of a writ of execution, dated January 12, A. D. 1907, issued out of the Circuit Court of the United States for the District of Montana, on a judgment rendered in said court, on the 16th day of January, A. D. 1902, in favor of Charles D. McLure and against

the Diamond R. Mining Company, I have, on this 18th day of February, A. D. 1907, levied upon the following described personal property, situate in the County of Cascade, State of Montana, to wit:

Pipe-fittings, bolts, belting, packing, pumps, household, office and kitchen goods and furniture and supplies; shafting, blocks, pulleys, iron, lumber, nails, screws, electric fittings, wire, lamps, washers, valves, and any and all other tools, implements, fittings, supplies, a more particular description of which may be found in the return on the writ of attachment issued by said court in the case of Charles D. McLure against the Diamond R. Mining Company; and that I will accordingly offer said personal property for sale, at public vendue, to the highest bidder, for cash, on the 26th day of February, A. D. 1907, at 10 o'clock A. M., or as soon thereafter as possible, at Neihart, Montana, in said District, on the premises of the Diamond R. Mining Company.

Dated Helena, Montana, February 18th, A. D. 1907.

ARTHUR W. MERRIFIELD,
U. S. Marshal, District of Montana.
By Scott N. Sanford,
Deputy.

BACH, WIGHT & THOMPSON,
Plaintiff's Attorneys.

Exhibit "C" [to Amended Answer and Cross-bill].

Personal property of Diamond R. Mining Company sold at Marshal's sale, February 26th, 1907, under execution to which this is attached.

Lot No. 1 in Concentrator Building.

Sold to Charles D. McLure for $100.00.

Lot No. 2 in concentrator.

Sold to Charles D. McLure, for $35.00.

Lot No. 3 in Assay Office.

Sold to Charles D. McLure, for $200.00.

Lot No. 4, Iron House.

Sold to Charles D. McLure, for $18.00.

Lot No. 5, Tool House.

Sold to Charles D. McLure, for $5.00.

Lot No. 6, in Office Warehouse.

Sold to Charles D. McLure, for $420.00.

[Endorsed]: Title of Court and Cause. Amended Answer and Cross-bill. Filed Feb. 1st, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 1st day of February, 1909, Demurrer to the Cross-bill was filed herein, said Demurrer being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,

Complainant,

vs.

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana.

Defendants.

Demurrer [to Cross-bill].

Demurrer of Charles D. McLure, complainant, to the cross-bill of complaint of the defendants above named:

And now comes the complainant, Charles D. McLure, and not confessing any of the matters in the cross-bill of complaint of defendants herein to be true, demurs to the cross-bill of complaint of the defendants herein filed, and says the same does not state any matter of equity entitling the defendants herein to the relief prayed for in said cross-bill, nor are the facts as stated in said cross-bill sufficient to entitle defendants to any relief against this complainant.

Wherefore, complainant prays the judgment of this Court whether he shall further answer said cross-bill, and that he be dismissed with his costs under said cross-bill of complaint of defendants.

Dated January 25, 1909.

WIGHT & PEW,
Solicitors for Complainant.

I, Ira T. Wight, solicitor for complainant in the above, do certify that the foregoing demurrer, in my opinion, is well founded in law.

IRA T. WIGHT,
Solicitor for Complainant.

State of Georgia,
County of Fulton,—ss.

I, Charles D. McLure, complainant in the above cause, being duly sworn, do say that the foregoing demurrer in not interposed for delay.

CHARLES D. McLURE.

Subscribed and sworn to before me this first day of February, A. D. 1909.

[Seal] HANSON W. JONES,
Notary Public in and for Fulton County, State of Georgia.

My commission expires Mch. 2, 1909.

HANSON W. JONES.

[Endorsed]: Title of Court and Cause. Demurrer to Cross-bill. Filed as of date Feb. 1, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 5th day of April, 1909, an Order Sustaining the Demurrer to the Cross-bill was duly made and entered herein, in the words and figures following, to wit:

[Order Sustaining Demurrer to Cross-bill.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 892.

CHARLES D. McLURE,

vs.

GREAT FALLS NATIONAL BANK et al.

This cause, heretofore submitted to the Court upon demurrer to the cross-bill, and for hearing upon bill and answer, came on regularly at this time for the judgment and decision of the Court; and after due consideration, it is ordered that said demurrer to cross-bill be, and the same hereby is, sustained, and that a decree be entered in favor of the complainant upon bill and answer. Exception of defendants noted.

Entered in open court April 5th, A. D. 1909.

GEO. W. SPROULE,

Clerk.

And thereafter, to wit, on the 10 day of April, 1909, Decree was duly rendered and entered herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,

Complainant,

vs.

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana.

Defendants.

Decree.

This cause coming on to be heard upon the cross-complaint of the defendants herein and the demurrer of the complainant to the said cross-complaint of defendants; and upon the bill of complaint of complainant and amended answer of the defendants thereto, the same having been heretofore, to wit, on Monday, the fourth day of January, 1909, set down for hearing upon bill and answer;

And counsel for respective parties having thereafter appeared and submitted to the Court their arguments in said cause; and the Court being fully advised in the premises:

It is ordered, adjudged and decreed, that the demurrer to said cross-bill be sustained, and that said

cross-bill of complaint be and the same is hereby dismissed.

It is further ordered, adjudged and decreed, that the said defendants, the Great Falls National Bank, a corporation, American Engineering Works, a corporation, and Ed Hogan, as Sheriff of Cascade County, State of Montana, their and each of their servants, agents, employees, attorneys and assigns, be, and they are hereby, permanently enjoined and restrained from seizing, selling or removing, or in any way interfering with the property, or any part or portion of the same, described as follows:

One-third interest in the Compromise Quartz Lode Mining Claim, Patent No. 1964.

The Moulton Quartz Lode Mining Claim, Patent No. 2471.

The South Carolina Quartz Lode Mining Claim, Patent No. 3153.

The Unity Quartz Lode Mining Claim, Patent No. 3253. All situate in Cascade County, Montana.

Lots 1, 2, 3, 4, 5 and 15, of Block No. 2, of the Frisco Claim.

Lots 1, 2, 3, 4, 5, 12, 13, 14, and 15, Block No. 3, of the Frisco Claim.

Lots 1 and 2 of Block No. 5, of the Frisco Claim.

Lots 1 and 2, 34, 35 and 36, of Block No. 6 of the Frisco Claim.

Certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for concentrator site.

The two water rights on Belt Creek.

The tramway and right of way for same, between Moulton Mine and the Concentrator Building.

The water flume and the rights of way for same.

The quartz location known as Belt No. 2.

Concentrator Building, power-house, and buildings at mines, and all machinery in all the buildings aforesaid, including engines, hoists, etc., etc.

Together with all fixtures and appurtenances thereunto belonging, all situate in Cascade County, Montana.

All of said property being as described in Exhibit "A" to the Marshal's return of the sale of real estate under execution in the case of Charles D. McLure vs. The Diamond R. Mining Company issued under judgment rendered by this Court in said cause; including the property described in the deeds and records referred to in said Marshal's return, a copy of said Marshal's return being attached to defendant's amended answer and cross-bill of complaint herein.

Further ordered, that complainant have and recover his costs from the defendants herein.

Done in open court this 10th day of April, 1909.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and Entered April 10, 1909. Geo. W. Sproule, Clerk.

Certificate to Enrolled Papers.

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this court.

Witness my hand and the seal of said court at Helena, Montana, this 10th day of April, A. D. 1909.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

And thereafter, to wit, on the 24th day of April, 1909, defendants filed their Assignment of Errors herein in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,
Complainant,
vs.
GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana,
Defendants.

Assignment of Errors.

The above-named defendants, the Great Falls National Bank, American Engineering Works, and Ed Hogan, as Sheriff of Cascade County, State of Montana, file the following assignment of errors, upon which they will rely upon this appeal from the final decree made and entered by the Court in

the above-entitled action on the 10th day of April, 1909.

The appellants assign as errors upon this appeal the following, to wit:

That the Court erred in granting the final decree and permanent injunction in this case for the following reasons, to wit:

1. The bill of complaint did not state facts sufficient to entitle the complainant to the relief prayed for, or any relief whatever, and that said bill is without equity.

2. That issues of fact were raised by the amended answer of these appellants to said bill of complaint, which in law and equity prohibited the Court from making and entering a decree upon a hearing upon the bill and amended answer.

3. That it appears undisputed from the said complainant's bill and the amended answer of the defendants and defendants' cross-bill that the Equator quartz lode mining claim was never levied upon, advertised or sold by the United States Marshal under process issued out of this court, or otherwise, and that the said Equator quartz lode mining claim had been levied upon by these defendants under a writ of attachment issued out of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, at a time prior to said complainant's obtaining any lien thereon and that the said Equator quartz lode mining claim had also been levied upon by these defendants and appellants in the aforementioned suit by virtue of a writ

of attachment issued out of the aforementioned court prior to complainant's obtaining any lien thereon.

4. That it appears undisputed from the pleadings in this case that the complainant herein never had any lien upon the Equator quartz lode mining claim, except subject to the lien of these defendants and appellants, and that the Marshal of this Court did not advertise or sell the said Equator quartz lode mining claim under the process issued by this Court, or otherwise, and that the lien of these defendants and appellants was the first lien upon the said Equator quartz lode mining claim and entitled to protection as such.

5. That it is undisputed in this case as appears by the pleadings herein that the Marshal of this court did give to said complainant a certificate of sale under the execution issued in favor of complainant herein, which named, covered and included the Equator quartz lode mining claim, when in truth and in fact the said complainant never had any lien upon the said Equator quartz lode mining claim, except subject to the lien of these defendants and appellants, and that the said Marshal never levied upon, advertised or sold the said Equator quartz lode mining claim under the process upon which said certificate of sale was issued.

6. That it is undisputed in this case, as disclosed by the pleadings herein, that the Marshal of this court did execute and deliver to the complainant herein a Marshal's deed which included and covered the Equator quartz lode mining claim, when

in truth and in fact the Marshal of this court never advertised or sold the said Equator quartz lode mining claim, and that the complainant herein never had any lien upon the said Equator quartz lode mining claim, save and except subject to a lien of these defendants and appellants.

The Circuit Court erred in sustaining complainant's demurrer to defendants' and appellants' cross-bill and in entering a decree or order dismissing said cross-bill for the following reasons:

1. That the said cross-bill states facts sufficient to entitle these defendants and appellants to the relief prayed for therein.

2. That by the demurrer of said complainant to said cross-bill, said complainant admitted all the allegations of said cross-bill properly pleaded; that the allegations in said cross-bill thus admitted were and are sufficient to warrant the relief asked by these defendants and appellants in said cross-bill.

3. That under the rules and practice of this Court and courts of equity of the United States, defendants and appellants were entitled to a reasonable time after said demurrer was sustained to amend their said cross-bill.

In order that the foregoing assignment of errors may be made to appear of record, the said defendants and appellants, the Great Falls National Bank, American Engineering Works, and Ed Hogan, as Sheriff of Cascade County, State of Montana, present the same to the Court and pray that such disposition be made thereof as is in accordance with

the laws and statutes of the United States in such cases made and provided.

CLAYBERG & HORSKY,
A. C. GORMLEY,
Solicitors for Defendants and Appellants.

Service of the foregoing assignment of errors admitted and copy received this 24th day of April, 1909.

WIGHT & PEW,
Solicitors for Complainant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed April 24, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 24th day of April, 1909, defendants filed their Petition for New Trial herein, said Petition being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,

Complainant,

vs.

The GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana,

Defendants.

Petition for Order Allowing Appeal.

Come now the above-named defendants and appellants, the Great Falls National Bank, American Engineering Works, and Ed Hogan, Sheriff of Cascade County, State of Montana, and conceive themselves to be aggrieved by the decree and order of this Court made and entered on the 10th day of April, 1909, wherein and whereby the demurrer of the complainant to the cross-bill of the defendants was sustained and said cross-bill dismissed, and wherein and whereby a decree was entered in favor of the complainant, Charles D. McLure, against said defendants upon hearing upon the bill of complaint of the complainant and amended answer of defendants thereto, and wherein and whereby the said defendants, and each of them, were permanently enjoined and restrained from seizing, selling or removing, or in any way interfering with the property, or any part or portion of the same, as described in said decree, and defendants and appellants hereby petition said Court to allow said defendants and appellants to appeal from said final decree and order in accordance with the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which said defendants and appellants should give and furnish upon said appeal, and your petitioners will ever pray.

CLAYBERG & HORSKY,
A. C. GORMLEY,
Attorneys for Defendants and Appellants.

Service of the foregoing petition for allowance of appeal admitted and copy received this 24th day of April, 1909.

WIGHT & PEW,
Attorneys for Complainant and Appellee.

[Endorsed]: Title of Court and Cause. Petition for Order Allowing Appeal. Filed April 24, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 24th day of April, 1909, an Order Allowing Appeal was duly made and entered herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,
Complainant,

vs.

The GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana,
Defendants.

Order Allowing Appeal, etc.

On motion of Clayberg & Horsky and A. C. Gormley, solicitors and counsel for defendants and appellants, and upon filing of a petition of said defendants and appellants for an order allowing an appeal, together with the assignment of errors, it is hereby or-

dered that an appeal of the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 10th day of April, 1909, granting a permanent injunction against the said defendants and sustaining complainant's demurrer to defendants' cross-bill and dismissing said cross-bill; that the amount of bond upon said appeal be and the same is hereby fixed at the sum of Three Hundred Dollars, and that a certified transcript of the records of proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

Dated April 24th, 1909.

WILLIAM H. HUNT,
Judge.

Service of the foregoing order allowing appeal and receipt of copy thereof are hereby acknowledged and admitted this 24th day of April, 1909.

WIGHT & PEW,
Solicitors for Complainant and Appellee.

[Endorsed]: Title of Court and Cause. Order Allowing Appeal. Filed and Entered April 24, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of April, 1909, Bond on Appeal was filed herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES D. McLURE,

Complainant,

vs.

The GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana,

Defendants.

Bond on Appeal.

Know all Men by These Presents: That we, the Great Falls National Bank, a corporation, American Engineering Works, a corporation, and Ed Hogan, as Sheriff of Cascade County, State of Montana, as principals, and R. S. Ford and R. P. Rickards, of the County of Cascade, State of Montana, as sureties, are held and firmly bound unto the above-named complainant, Charles D. McLure, in the full and just sum of Three Hundred Dollars, to be paid to the said Charles D. McLure, his attorneys, solicitors, successors or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents:

The conditions of the above obligation is such that, whereas the Great Falls National Bank, American Engineering Works, and Ed. Hogan, as Sheriff of Cascade County, State of Montana, having taken an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse a final decree rendered and entered by the Circuit Court of the United States, for the Ninth Circuit, in and for the District of Montana, against these defendants, and from an order and decree sustaining complainant's demurrer to said defendants' cross-bill and dismissing said cross-bill, which order and decree were made and entered in the above-entitled action on the 10th day of April, 1909;

Now, therefore, the condition of the above obligation is such that if the above-named defendants, the Great Falls National Bank, American Engineering Works, and Ed. Hogan, as Sheriff of Cascade County, State of Montana, shall prosecute said appeal and shall answer all damages and costs that may be awarded against them, if they fail to make good their said appeal, then the above obligation is to be void, otherwise to be and remain in full force and effect.

Sealed with our seals and dated this 24th day of April, in the year of our Lord Nineteen Hundred and Nine (1909).

GREAT FALLS NATIONAL BANK,
By R. S. FORD, President.
R. S. FORD.
R. P. RICKARDS.

United States of America,
State and District of Montana,
County of Cascade,—ss.

R. S. Ford and R. P. Rickards being severally duly sworn, each for himself deposes and says; that he is a resident freeholder of the county of Cascade, State of Montana; that he is one of the sureties to the foregoing undertaking; that he is worth the sum specified therein as a penalty thereof, over and above his just debts and liabilities, exclusive of property exempt by law from execution.

R. S. FORD.
R. P. RICKARDS.

Subscribed and sworn to before me this 24th day of April, 1909.

[Seal] RICHARD BENNETT,
Notary Public in and for the State of Montana, Residing at Great Falls, Mont.

My commission expires on the 17th day of July, 1910.

The foregoing bond and sufficiency of sureties on said bond are hereby approved this 26th day of April, 1909.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Bond on Appeal. Filed April 26, 1909. Geo. W. Sproule, Clerk.

That on the 24th day of April, 1909, a Citation was duly issued herein, which said Citation is hereunto annexed, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

CHARLES D. McLURE,

Complainant,

vs.

The GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS (a Corporation), and ED. HOGAN, as Sheriff of Cascade County, State of Montana,

Defendants.

Citation on Appeal [Original].

United States of America,—ss.

The President of the United States to Charles D. McLure and to Messrs. Wight & Pew, his Attorneys, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an order allowing an appeal duly entered in the clerk's office of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, in that certain action numbered 892 wherein Charles D. Mc-

Lure is complainant and appellee and The Great Falls National Bank, a corporation, American Engineering Works, a corporation, and Ed. Hogan, as Sheriff of Cascade County, State of Montana, are defendants and appellants, to show cause, if any there be, why the final decree rendered against the said defendants and appellants, as in said order allowing said appeal mentioned, should not be granted, and why speedy justice should not be done in that behalf.

Witness, the Honorable WILLIAM H. HUNT, Judge of the District Court of the United States of America, District of Montana, this 24 day of April, Nineteen Hundred Nine (1909) and the Independence of the United States the One Hundred and Thirty-third (133d).

WILLIAM H. HUNT,
Judge.

Service of the foregoing citation on appeal in the above-entitled action and receipt of copy thereof are hereby acknowledged and admitted this 24 day of April, 1909.

WIGHT & PEW,
Solicitors for Complainant and Appellee.

[Endorsed]: No. 892. In the Circuit Court of the United States, Ninth Circuit in and for the District of Montana. Charles D. McLure, Complainant, vs. The Great Falls National Bank, a Corporation, American Engineering Works, a Corporation, and Ed. Hogan, as Sheriff of Cascade County, State of Montana, Defendants. Citation on Appeal. Filed

and Entered Apr. 24, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 80 pages, numbered consecutively from 1 to 80, is a true and correct transcript of the pleadings, process, decree, final record and all proceedings had in said cause, and of the whole thereof, as appears from the original files and records of said court in my possession as such clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify and return that the costs of the transcript of record amount to the sum of Seventy-five and 60/100 Dollars ($75.60), and have been paid by the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court, Ninth Circuit, District of Montana, at Helena, Montana, this 5th day of May, A. D. 1909.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1717. United States Circuit Court of Appeals for the Ninth Circuit. The Great Falls National Bank (a Corporation), American Engineering Works (a Corporation), and Ed. Hogan, as Sheriff of Cascade County, State of Montana, Appellants, vs. Charles D. McLure, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed May 17, 1909.

F. D. MONCKTON,
Clerk.

No. 1717

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE GREAT FALLS NATIONAL BANK (a corporation), AMERICAN ENGINEERING WORKS (a corporation), and ED. HOGAN, as sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

BRIEF FOR APPELLANT.

CLAYBERG & HORSKY,
Attorneys for Appellants.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE GREAT FALLS NATIONAL BANK (a corporation), AMERICAN ENGINEERING WORKS (a corporation), and ED. HOGAN, as sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

BRIEF FOR APPELLANT.

Statement of Case, and Pleadings.

This is an appeal by the defendants in the above entitled cause, from a Decree of the Circuit Court, District of Montana, passed and entered on the 10th day of April, 1909, by which complainants demurrer to defendant's cross bill was sustained and the cross bill dismissed, and also a permanent injunction granted against defendants according to the prayer of the original Complaint. No testimony was adduced before the Court by either party, but the case was set down and heard on bill and answer and upon demurrer to defendant's cross bill.

The Bill of Complaint (aside from the jurisdictional allegations), in brief alleges as follows, viz:

That on December 14th, 1901, the complainant herein instituted a suit at law in the United States Circuit Court of Montana, against the Diamond R. Mining Company, for the purpose of recovering judgment for certain moneys advanced to said company by said complainant; that complainant attached certain property of said company. The allegations of attachment as to the property involved herein being in the following language. "That on the 16th day of December, 1901, said Marshall also duly levied, under and in pursuance of said Writ of Attachment, upon the real property of said Diamond R. Mining Company, by filing a copy of said Writ of Attachment with the Clerk and Recorder of the County of Cascade, State of Montana, in which said County said real property and the whole thereof was situated, and by filing with the said Clerk and Recorder at the same time a notice in due form that the said real property, together with all the fixtures and appurtenances thereto belonging was attached." (Record, pages 3 and 4.)

That on Jan. 16th, 1902, he recovered judgment for $86,180 and $53.30 costs of suit, (record, page 4); that on Jan. 10th, 1907, a writ of execution was duly issued on this judgment and delivered to the marshal, (record, page 4); that in pursuance of such execution the marshal duly levied upon "said real estate and personal property," of said Mining Company and, after giving due and legal notice, sold the personal property of the plaintiff there-

under (plaintiff herein), who is still the owner of the same. (Record, pages 4 and 5); that on Feb. 26th, 1907, said marshal having given due and legal notice of sale, sold "said real property so levied upon," together with the fixtures and appurtenances, to complainant, and executed to him a certificate of sale, a copy of which is attached to the complaint as Exhibit A (record, page 5); that no redemption of said real property was made and on Feb. 27th, 1908, said marshal duly executed in due form his deed of "said real property as described in said certificate of sale" (record, pages 5 and 6); that the defendant, the Great Falls National Bank, recovered judgment against the Diamond R. Mining Company on or about the ..... day of February, 1902, and that the American Engineering Company recovered a judgment against the Mining Company on December 27th, 1904 (record, page 6); that on January 8th, 1907, said defendants filed separate Bills of intervention in the suit in which complainant had recovered judgment, praying that complainant herein be enjoined from selling the property of the Diamond R. Mining Company under said judgment; that they respectively filed their supplemental Bills of Intervention, which were dismissed Feb. 2nd, 1907, upon the hearing of demurrer thereto, (record, pages 6 and 7); that on Feb. 25th, 1907, the defendant, the Great Falls National Bank, filed its Bill of Complaint in this Court against the Complainant herein, the Diamond R. Mining Company and the marshal of the United States Court, a copy of which is attached to the complaint herein and marked

"Exhibit B"; that complainant herein demurred to said bill, which demurrer was sustained and the decree entered on Aug. 6th, 1907, dismissing said bill, (record, pages 7 and 8); that the Great Falls National Bank appealed from such decree to this court, which entered judgment of affirmance thereon, which judgment is still unmodified and unreversed, (record, page 8); that the defendant, the American Engineering Company, filed a similar bill of complaint against complainant herein, which was also dismissed upon the hearing of a demurrer, (record, page 9); that by stipulation the suit of this Engineering Company was to abide the decision in the bank case; that certain fixtures, buildings and appurtenances (not involved herein) passed by said sale, (record, page 10); that the Great Falls National Bank and the American Engineering Company on Nov. 7th, 1908, issued executions on their judgments against the Diamond R. Mining Company, delivering them to Defendant Hogan (the Sheriff of Cascade County) for levy, and directed and procured him to levy upon the property of the Diamond R. Mining Company, (record, pages 10 and 11); that said Sheriff had given notice that he would sell the Equator Lode Mining Claim on December 4th, 1908, and that he would do so unless restrained by the Court, thereby casting a cloud upon complainant's title, (record, page 12); and that defendants well knew that the Diamond R. Mining Company had no right to any of the property since Feb. 26th, 1907.

Upon these allegations an injunction was prayed for

against the Sheriff, restraining him from making the sale, and against all the parties defendant from further interfering with the property so sold to the complainant by the marshal.

The marshal's certificate of sale, attached as Exhibit A to said complaint, described the Equator Lode claim as follows: "All that portion of the Equator Lode Mining Claim which was heretofore conveyed to L. S. McLure by John McAssey and H. J. Skinner by deed, duly recorded in the office of the County Clerk and Recorder of the said County of Cascade, State of Montana, and by said L. S. McLure conveyed to Diamond R. Mining Company" (record, page 17) (record 19).

The Bill of Complaint of the Great Falls National Bank (a copy of which is attached to the bill herein) was filed by the Bank against McLure, the Diamond R. Mining Company and the U. S. Marshal for the District of Montana, for the purpose of obtaining a decree permitting the complainant therein to take possession of and sell the prop erty described in such complaint, or so much thereof as might be necessary to satisfy its judgment; and that it be adjudged to have a first and prior lien upon all said property, and that the attachment by the complainant herein should be held null and void and of no effect because of fraud; and that the judgment entered in favor of complainant herein should be null and void as to the bank, or in any event that it had become satisfied; that the writ of execution therein be withheld; that the defendant (complainant herein) be restrained and enjoiend from

selling or disposing of the property under the Writ of Execution. To this Bill of Complaint (attached as an exhibit to the original Bill herein) was attached Exhibit Aa, the return of the marshal on the attachment of complainant herein as set forth in his original Bill. The action was based solely upon the alleged fraud of McLure and the sufficiency of the levy of his attachment upon the Equator lode was not necessary to the relief prayed and was not raised by the Bill.

To the original Bill of Complaint filed herein, the defendants filed an amneded answer and Cross Bill. In the amended answer the following allegations may be found.

Defendants admit the allegations in paragraph V of the original Bill, "save and except the allegation that the U. S. marshal levied upon all the personal property and all of the real property of said Diamond R. Mining Company, which allegation defendants deny." They also admit the allegations of paragraphs VII and VIII of said bill, except the allegation that the marshal "advertised for sale, levied upon and sold all of the real and personal property of the said Diamond R. Mining Company," which allegations defendants deny. And they allege that "the said United States marshal never at any time levied upon, or advertised for sale, or sold the ore bins, blacksmith shop, a portion of the power house, or tramway, all of which were and are personal property, nor did he at any time advertise for sale or sell the Equator Quartz Lode Mining claim, which was and is a patented mining claim, being Survey No. 3020" (record, page 48); Defendants then

deny certain other allegations, (immaterial in this action) and make certain further affirmative allegations, one of which is that the property which is set forth in paragraph XVIII of the Bill of Complaint herein should have been included in the list of property described in the marshal's Certificate of Sale (Exhibit A, attached to said Bill of Complaint) or in the marshal's deed thereafter, executed, "for the reason that the same was never levied upon, or advertised for sale, or sold, and that the complainant has never acquired any right, title or interest in and to any of said property."

The answer then further alleges that the defendants, the Great Falls National Bank and the American Engineering Company had a first and prior levy upon all of the property mentioned in the Bill of Complaint herein, and has obtained such lien as to the Real Estate, by the levy of an attachment on the 17th day of December, 1901. (Record, pages 48 and 49).

The Cross Bill of Defendant alleges (aside from jurisdictional facts)the commencement of their suits against the Diamond R. Mining Company and the levy of their respective attachments; the recovery of their respective judgments, their docketing; that no part thereof had been paid, and that the same were still valid and in full force. (Record, pages 50 and 51). The Cross Complaint then alleges the commencement of the suit by the complainant herein against the Diamond R. Mining Company, the issuance of the writ of attachment, the filing of the notice of attachment by the marshal, with the County Clerk and

Recorder of Cascade County. (Record, page 52). It then alleges that the return of said marshal to said Writ of Attachment, containing a full and correct description of the property levied upon, is attached to the Cross Complaint marked Exhibit Aa. The Cross Complaint then alleges the entry of judgment in favor of complainant herein, against the Diamond R. Mining Company on the 16th day of January, 1902, (record, page 52). It further alleges that complainant herein did not issue execution on said judgment until the 10th day of January, 1907; that the marshal proceeded with the service of said Writ of Execution by advertising for sale certain real estate and personal property theretofore attached by him in said action, a copy of which notice is attached to the marshal's return on execution, marked "Exhibit Aa" and attached to the Cross Complaint; "that the property levied upon was sold on the 26th day of January, 1907, by the U. S. marshal, to the complainant herein; that a Certificate of Sale was issued and that thereafter on the 27th day of February, 1908, marshal made, executed and delivered his deed or all of said property to the said complainant herein." (Record, page 53.) The Cross Complaint then alleges that the defendants, the Great Falls National Bank and the American Engineering Works, on the 7th day of October, 1908, procured executions on their respective judgments, which were levied upon the Equator Lode Mining Claim, Survey No. 3020, and other property; that the Sheriff proceeded to advertise for sale "all the right, title and interest of said Diamond R. Mining Com-

pany in said Equator Quartz Lode Mining Claim, for sale on the 4th day of December, 1908, under said writ of execution." Whereupon, a restraining order was issued in this suit which prevented the sale. (Record, pages 54 and 55.)

The Cross Complaint then avers that a Certificate of Sale and Deed executed by the U. S. marshal to complainant herein are null and void so far as passing any title whatsoever to the Equator Quartz Lode Mining Claim for the reason that no levy was made thereon under the Writ of Attachment in said action of Charles D. McLure against the Diamond R. Mining Company, and for the further reason that said Equator Lode was not advertised, or noticed, or offered for sale by said marshal, nor was the same sold by him, and that the inclusion of the said Equator Lode in the property described in said Certificate of Sale and the said marshal's deed was therefore a nullity. (Record, page 56.) The cross complaint then contains allegations of other reasons why the Certificate of Sale and Deed are void; then continues to the effect that the judgment of the complainant, McLure, against the Diamond R. Mining Company never became a lien upon the Equator Lode Mining Claim, and if it did it was subject to the prior attachment lien of the Bank and the Engineering Company, levied at a time when complainant herein had no lien and that whatever pretended lien complainant had, had become entirely lost. (Record, page 57.) The purpose of the Cross Complaint was to procure relief by a decree determining that defendant's

attachments duly created and levied upon the Equator Lode Mining Claim were prior in point of time, and superior in point of law to any lien of complainant herein, and determining and deciding that complainant herein had acquired no rights to or upon said Equator Lode Claim by the proceedings taken in his behalf, or by the sale made by said marshal, or by his deed. The Cross Complaint then alleges the Diamond R. Mining Company has not now and never has had any of the property out of which the Cross Complaints could satisfy their judgments, or either of them, and that the Certificate of Sale and marshal's deed casts a cloud upon said property and upon defendant's liens thereon, wherefore they pray for a relief as above mentioned (Record, pages 58 and 59.) Exhibit Aa attached to said amended Cross Complaint is the return of the marshal of the Writ of Execution issued by the complainant, under which the certificate of sale and deed were issued. This return recites that "on the first day of February, 1907, at Neihart, Cascade County, Montana, under and by virtue of said Writ of Execution, I levied upon certain real estate standing upon the records of said Cascade County, State of Montana, in the name of the defendant mentioned in the said writ, and in possession of the U. S. marshal of Montana, by virtue of an attachment theretofore on the 16th da yof December, 1901, levied, which real estate is particularly described in the Notice hereto attached, marked 'Exhibit A", and which Notice I posted, filed and advertised as follows, on the 1st day of February, 1907." (Record, pages 61 and 62.) Then fol-

lows a specific statement of the places where the notice was posted, and the paper in which it was published. The return then refers to certain personal property which was also levied upon by the attachment, its advertisement and sale; (Record, pages 62 and 63) then refers to a portion of the real estate which was sold by the marshal as Lot 1 (Record, page 63) and then continues "I then and there exposed and offered for sale at public vendue, to the highest bidder for cash in one lot as aforesaid——and thus sold the same to Charles D. McLure." The notice of sale which is attached to the return and made a part thereof, contains the following description of the property: "Certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure dated June 9th, 1899, used for a concentrator site." (Record, page 67.)

To this Cross Bill the complainant filed its demurrer for want of equity.

It will be noticed that in the decree, the Equator Quartz Lode Mining Claim, is not specifically mentioned. It quotes the language of the marshal's return to the atachment and of the Notice of Sale and then adds "all of said property being as described in exhibit to the marshal's return of sale of real estate under execution in the case of Charles D. McLure against the Diamond R. Mining Company, issued under judgment rendered by this court in such case; including the property described in the deeds and records referred to in said marshal's return being at-

tached to defendant's Amended Answer and Cross Bill of Complaint herein." (Record, pages 74 and 75.)

Briefly the following situation is disclosed by the pleadings, viz: Complainant brought suit against the Diamond R. Mining Company, issued an attachment therein, and the marshal of the court levied upon certain of its personal property and real estate. He omitted, however, to levy an attachment on the Equator Quartz Lode Mining Claim; Complainant recovered judgment against the Mining Company on the 16th day of January, 1902, and issued execution thereon on the 10th day of January, 1907, and advertised for sale *the property upon which the attachment had been levied in* 1901, and none other; that the marshal never levied upon, advertised or sold the Equator Quartz Lode Mining Claim, but described the same in his certificate of sale as having been advertised and sold upon such sale. He also included this lode claim in his conveyance of the premises. The Great Falls National Bank brought suit against the Diamond R. Mining Company in December, 1901, immediately after the suit brought by complainant herein. On the 17th day of December, 1901, the bank caused to be levied an attachment on the Equator Quartz Lode Mining Claim, together with other real and personal property of said Company; recovered judgment in February, 1902, and later levied executions on the Equator Quartz Lode Mining Claim and advertised the same for sale. The American Engineering Works did the same.

ARGUMENT.

The following errors are assigned:

1. The bill of complaint did not state facts sufficient to entitle the complainant to the relief prayed for, or any relief whatever, and that said bill is without equity.

2. That issues of fact were raised by the amended answer of these appellants to said bill of complaint, which in law and equity prohibited the Court from making and entering a decree upon a hearing upon the bill and amended answer.

3. That it appears undisputed from the said complainant's bill and the amended answer of the defendants and defendants' cross-bill that the Equator quartz lode mining claim was never levied upon, advertised or sold by the United States marshal under process issued out of this court, or otherwise, and that the said Equator quartz lode mining claim had been levied upon by these defendants under a writ of attachment issued out of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, at a time prior to said complainant's obtaining any lien thereon and that the said Equator quartz lode mining claim had also been levied upon by these defendants and appellants in the aforementioned suit by virtue of a writ of attachment issued out of the aforementioned court prior to complainant's obtaining any lien thereon.

4. That it appears undisputed from the pleadings in this case that the complainant herein never had any lien upon the Equator quartz lode mining claim, except sub-

ject to the lien of these defendants and appellants, and that the marshal of this Court did not advertise or sell the said Equator quartz lode mining claim under the process issued by this Court, or otherwise, and that the lien of these defendants and appellants was the first lien upon the said Equator quartz lode mining claim and entitled to protection as such.

5. That it is undisputed in this case as appears by the pleadings herein that the marshal of this Court did give to said complainant a certificate of sale under the execution issued in favor of complainant herein, which named, covered and included the Equator quartz lode mining claim, when in truth and in fact the said complainant never had any lien upon the said Equator quartz lode mining claim, except subject to the lien of these defendants and appellants, and that the said marshal never levied upon, advertised or sold the said Equator quartz lode mining claim under the process upon which said certificate of sale was issued.

6. That it is undisputed in this case, as disclosed by the pleadings herein, that the marshal of this Court did execute and deliver to the complainant herein a marshal's deed which included and covered the Equator quartz lode mining claim, when in truth and in fact the marshal of this court never advertised or sold the said Equator quartz lode mining claim, and that the complainant herein never had any lien upon the said Equator quartz lode mining claim, save and except subject to a lien of these defendants and appellants.

The Circuit Court erred in sustaining complainant's demurrer to defendants' and appellants' cross-bill and in entering a decree or order dismissing said cross-bill for the following reasons:

1. That the said cross-bill states facts sufficient to entitle these defendants and appellants to the relief prayed for therein.

2. That by the demurrer of said complainant to said cross-bill, said complainant admitted all the allegations of said cross-bill properly pleaded; that the allegations in said cross-bill thus admitted were and are sufficient to warrant the relief asked by these defendants and appellants in said cross-bill.

3. That under the rules and practice of this Court and courts of equity of the United States, defendants and appellants were entitled to a reasonable time after said demurrer was sustained to amend their said cross-bill.

These several assignments of errors may be considered under two general heads, namely:

1. What effect, if any, should be given to the denials and allegations of appellants' pleadings?

2. Do the pleadings show that the complainant, Charles D. McLure, acquired any title to the Equator quartz lode mining claim as against the rights of the appellants.

erally that *all* real estate belonging to the Diamond R. Mining Company had been levied upon, advertised for sale and sold by the marshal, the answer specifically denying that the *Equator lode* was ever levied on, advertised for sale or sold, and further specifically alleging that it was not, which for the purpose of this hearing stand admitted.

The examination of the cross complaint filed will also disclose allegations that no levy was made on the Equator claim either under the Writ of Attachment or execution in the McLure suit, and that it was not advertised, noticed or offered for sale by the marshal, or sold by him, (record, page 56, paragraph VIII, cross complaint). And that the judgment in the McLure case never became a lien upon the Equator claim except subject to the attachment of appellant duly levied thereon.

It was contended in the court below, by counsel for respondent, that the marshal's deed which covered and described the Equator claim, having been pleaded and admitted, the statutory presumption of regularity of official proceedings, attached, and the deed became, at least prima facie, evidence of title, which stood until impeached. Admitting, for the purposes of argument, that this proposition is true, this presumption is, under the express terms of our statutes (Sec. 7962 Revised Codes of Montana) disputable, and we submit that the allegations of the answer of the cross complaint last above referred to if true, overcame the presumption. If respondent, McLure, had no lien on the Equator lode claim, the marshal had no power to sell it under the execution. The absence of such

lien is alleged in the answer and cross complaint and must be admitted to be true upon this argument. But the answer and cross complaint go further and specifically allege that the Equator claim was never levied upon, advertised or sold by the marshal under the McLure execution. If McLure had a lien and the marshal actually sold the Equator lode without advertising, such sale might be held valid under the case of Burton vs. Kipp, 30 Mont. 275, but we know of no case in which it has been held that a deed upon execution can convey any property other than that *actually sold.* To hold otherwise would turn the provisions of the statutes into a vehicle of fraud and enable a dishonest officer and a disreputable judgment creditor to obtain title to a judgment debtor's property under the guise of the statute, relative to executions, without following the same, in absolute violation thereof and in fraud of his rights. No such holding can stand for a moment. No court can say that an officer can describe in a deed given in pursuance of his sale under execution, any property except such as he has *actually sold* under said execution. The sale is the basis of the deed and the deed can go no further than the sale. If the officer did not sell certain property he is absolutely prohibited from describing the same in the deed and reciting that it had been sold. Such deed would be absolutely void as to the property not sold and be open to attack in any proceeding, even though a collateral one. The fact that the deed included property not sold by the officer may always be shown.

Doe vs. Tiffany, 5 U. C. Q. B. 79.

No complaint is made that the allegations of the answer and cross complaint above referred to, are not well pleaded. No motion was made in the court below to strike any of such allegations from the pleadings and no exception was taken, either to the answer or to the cross complaint, but complainant set the case for hearing on bill and answer and a general demurrer for want of equity to the cross complaint.

It would not have been proper pleading for appellant to have alleged the steps which were omitted by the marshal in making his levy under his attachment or execution, which would show that no levy was actaully made, as such pleading would be stating the evidence. In pleadings, the *ultimate facts* should be alleged and the probative facts, or those going to prove such ultimate facts, should be entirely omitted. The ultimate fact here is that the marshal did not make any levy, and the probative facts tending to establish such ultimate fact would be those which disclose that the marshal failed to follow any of the statutory requisites in making the levy.

We submit therefore that the following facts stand admitted, viz: that the marshal never levied upon the Equator lode claim, either under his attachment or under his execution, and that he did not advertise the same for sale or sell the same. Therefore, the deed absolutely fails to convey the Equator claim. Even if counsel's contentions are correct that the deed itself is sufficient to show a prima facie title in McLure, such prima facie case, arising only from presumption, is rebutted, repelled and over-

thrown by the admission of the complainant that the Equator quartz lode mining claim was never levied upon; that McLure had no lien upon the same; and that the same was never advertised for sale or sold by the marshal under the execution.

Complainant's bill should have been discussed on this hearing and the court erred in not so doing.

II.

DO THE PLEADINGS SHOW THAT THE RESPONDENT, CHARLES D. McLURE, ACQUIRED ANY TITLE TO THE EQUATOR QUARTZ LODE MINING CLAIM AS AGAINST THE RIGHTS OF THE APPELANTS ?

Respondent McLure claims title to the Equator lode through an alleged sale of the same by the marshal of the court, under an execution duly issued on his judgment against the Diamond R. Mining Company.

An execution sale is only for the purpose of passing the legal title to lands to which the execution creditor has acquired an equitable title by virtue of some lien.

There are only three classes of liens which the respondent could have had upon the Equator lode claim, at the time of the alleged sale, namely; (a) a lien under his attachment, issued at the beginning of his suit against the Diamond R. Mining Company; (b) a judgment lien, which existed by virtue of the statute, against the Diamond R. Mining Company, upon the docketing of his judgment; (c) a lien acquired by levy under his execution.

The attachment lien, if one was acquired, merged into the judgment lien. If he had a judgment lien upon the Equator lode claim no levy under the execution would be required. An execution levy upon real estate is only necessary in cases where the execution creditor has no lien upon the land sought to be sold.

We shall now consider what, if any, lien upon the Equator claim respondent had acquired as against the rights of the appellants, at the time the execution sale.

(a) *Attachment Lien.*

The acquirement of an attachment lien is purely statutory; the lien results from the levy of a writ of attachment. The statute therefore prescribes how the lien attaches, by providing the method of the levy of the writ. It is as follows: "The sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in Section 6660 be not given, as follows:

"1. Real estate standing upon the records of the County in the name of the defendant must be attached by filing with the County Clerk a copy of the writ, together with the description of the property attached, and the notice of its attachment." (Section 6662 Revised Codes of Montana.)

This statute, allowing a lien contrary to the common law, must be strictly followed, or no lien is so acquired.

The marshal's return to the wriit of attachment is made a part of the pleadings (Record, pages 38 and 39). This

return is conclusive upon respondent and the marshal, as to what was done under the attachment.

3 Freeman on Executions, Sec. 363-4-5.
Dickerman v. Burgess, 20 Ill. 281.
Hutchins v. Carver, 16 Minn. 13.
Michaels v. Stork, 52 Mich. 260.
Phillips v. Evands, 64 Mo. 23.

No amendment appears ever to have been made to this return and it therefore must be considered as set forth in the pleadings. What does it show? It shows that the marshal levied upon "certain real estate hereinafter referred to standing upon the records of Cascade County, State of Montana, in the name of the defendant mentioned in said writ" by filing a copy of the attachment together with proper notice with the county clerk. Attached to this return is a copy of such notice. It describes the real estate sought to be levied upon as follows: The Compromise claim, the Moulton claim, the South Carolina claim, the Unity claim, and certain lots in the Frisco claim and "certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure dated June 9th, 1899, used for a concentrator site." The notice then describes certain water rights, water flumes, rights of way, and a certain tramway and rights of way for the same, and a quartz location known as Belt No. 2; also concentrator buildings, power house, and buildings at mine and all machinery in the buildings, aforesaid, including engines, hoists, etc. It clearly appears from this return that the only description of real estate, mentioned therein, which could possibly include

the Equator lode claim is as follows: "certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for a concentrator site," because all other descriptions are specific.

We insist that this description is insufficient to create any attachment lien upon the Equator lode claim or even upon any "certain vacated streets and alleys." If, however, it should be held sufficient to create *any lien,* such lien could only attach to the vacated streets and alleys. It will be noticed that the marshal did not undertake to levy his writ of attachment upon *all* the property conveyed by the deeds mentioned in his return, but only upon "certain vacated streets and alleys used for a concentrator site." There may have been conveyed other vacated streets and alleys of the town of Neihart standing of record in the name of the Diamodn R. Mining Company, which were also used for a concentrator site. The deeds may also in express terms have conveyed the Equator lode claim, as well as other property, but the levy was not made upon the Equator lode claim, or any other property, other than that part of the property mentioned in the deeds (if they conveyed other property) described as "certain vacated streets and alleys." We do not believe that this return is sufficient to create any lien upon any of the property mentioned and described in the deed referred to, for the reason that that it is too indefinite; gives no description; does not state the names of the grantors in said

deeds, nor that said deeds were recorded, nor give the book and page of the record.

So far as the return is concerned, there may have been many deeds given to L. S. McLure on Jnue 9th, 1899, of property in the town of Neihart, Cascade County, used for a concentrator site. How would any person undertake to determine the specific description and the boundaries of the vacated streets and alleys sought to be levied upon? Should they go to McLure and demand inspection of all deeds given to him by any person bearing date, June 9th, 1899, for the purpose of ascertaining whether or not these deeds conveyed vacated streets and alleys in the town of Neihart, by a sufficient description, to pass title? One is not directed to any record of any deed given by any person to McLure, dated June 9th, 1899, conveying anything. Under the law, what rights could possibly be attached or levied upon, under the language "certain vacated streets and alleys * * used for a concentrator site?" What streets and alleys? All streets, when regularly laid out in the plat of a townsite or addition thereto, are given known names or numbers; all alleys propery established, are located within blocks and between streets, and their location and boundaries distinctly and definitely shown on the map or plat. No names or numbers of streets sought to be levied upon are given, or other location, boundaries or area defined. No location, boundary or area of any of the vacated alleys is given.

If a street is legally and properly vacated it is no longer a street. If the town of Neihart was platted and laid out

as a public townsite under the statutes of the United States, the fee to all the streets and alleys therein, vested in the public for street purposes, (Hirschfield v. Rocky Mountain Bell Telephone Company, 12 Mont. 102,) and therefore such streets can never be vacated so as to pass any title, that always being in the town for public uses. A vacation of the streets or alleys would simply be an abandonment of their use for that purpose and would not transfer the title to the land covered by them. If, however, the townsite of Neihart or that part thereof in which the "certain vacated streets and alleys" were located, had been filed simply as an addition to the townsite of Neihart, or the owner of the land had simply platted the same under the state law, when the streets were vacated the title to the land covered by them would probably revert either to the owner of the land platted or to the abutters on the streets to whom the original owner sold lots. Taking the supposition, which is most favorable to the respondent, namely, that the title to the land over which the streets and alleys were laid out when such streets or alleys were vacated, reverted to the person who platted that part of the townsite, or to the abutting owners along such vacated streets and alleys, we must conclude that no levy could be made upon such "vacated streets and alleys." The words "streets and alleys" indicate a dedication for public use, and when that use has ceased the words are no longer available to designate or describe anything. A vacated street or alley is no street or alley, and a levy upon a vacated street or alley is a levy upon nothing. It is not

a levy upon the land formerly used for street or alley purposes. In order to obtain any atachment upon such land, the levy must be made upon a specific description of the property, because the vacated streets and alleys are necessarily a portion of a larger tract.

But again, the statute in regard to levy of writs of attachment was not complied with by the marshal. In order to obtain a lien under the section of the statute above quoted, the officer must file with the County Clerk of the County in which the property is situated "a copy of the writ of attachment, together with the description of the property atached and a notice that it is attached." The marshal's return shows that a copy of the writ and a notice that certain property was attached, was filed by him with the County Clerk. It will be noticed that the return does not state that he also filed with the County Clerk "the description of the property attached." True, the notice filed says that "said property was attached." We, however, contend that under the express wording of the statutes, the description of the property attached must be filed as a separate paper from the notice that certain property is attached. When the statute requires two papers to be filed, the filing of one would scarcely be a compliance with the statute.

We further contend that by the use of the words "together with *the* description of the property attached" means such description as will be sufficient to identify the property, so that any one examining the attachment records could ascertain what specific property had been at-

tached; that *"the"* description should be sufficient to enable any one on examination of the same, or any records therein referred to, to fully determine what particular property was attached; that the description should be of equal definiteness and certainty as that required in a deed, by which the same property could be said to be conveyed.

The use by the legislature of the definite article "the" instead of the indefinite article "a" must be considered and this word must be given its general meaning. "The" description of land requires much more definiteness and particularity than "a" description of land.

In the attachment statutes of Montana in force prior to 1895, the article "a" was used. This was changed to the article "the" by the code commissioners who prepared the code of 1895, and it has been constantly used in the statutes since that date. In the California statutes, from which most of the Montana statutes are taken, we find the article "a" used. Why was this change made? Evidently for some purpose. The only purpose which we can conceive is, that it was determined by the code commissioners that a more specific description of the property attached, should be required to be filed with the county clerk, than was required by the former attachment statutes.

Who could tell, by an examination of this notice of attachment filed with the County Clerk, what property was intended to be covered by the language "certain vacated streets and alleys, etc." It would simply give the investigator notice that the marshal sought to attach "certain vacat-

ed streets and alleys in the town of Neihart used for a concentrator site and more fully shown by deeds to L. S. McLure dated June 9th, 1899." One examining such notice would be entirely at sea. He is not referred to any specific deeds of any grantors to McLure so that he might search the record and find said deeds, if recorded. Neither is he referred to the record of any deed, thus designating the place in the records where the deed could be seen and the person examining it could ascertain the particular description of the property levied upon. We submit that clearly respondent acquired no lien upon the Equator lode claim by virtue of the writ of attachment.

(b) *Judgment Lien.*

The respondent McLure acquired no judgment lien upon the Equator lode claim except subject to the lien of appellants.

Under the statutes of the United States then in force, the respondent McLure probably acquired a judgment lien upon the interests of the Diamond R. Mining Company, on all real estate then standing of record in that company's name, in the State of Montana, by the entry and docketing of his judgment against that company. Such judgment lien could, however, only attach to the interest of the defendant the Diamond R. Mining Company as it then stood of record, and if appellants had acquired any lien of record upon the Equator lode claim, *prior* to the time respondent McLure's judgment lien attached thereto,

such judgment lien became and was subject to appellants' lien.

Sklower v. Abbott, 19 Mont. 228.

It, therefore, becomes important to inquire whether appellants had acquired any lien prior to that time. Respondent McLure's judgment was entered on January 16th, 1902, and the lien thereby given could not have attached prior to that date. It is alleged in appellants' answer (record, page 49) and in their cross-complaint (record, page 51) that appellants duly levied attachments on the Equator quartz lode mining claim on December 17th, 1901. These allegations stand admitted as true upon this hearing.

By these levies of appellants upon Equator lode claim, prior to the entry of respondent McLure's judgment, they acquired a prior lien upon that claim, and the marshal had no right, power or authority to sell such claim under respondents McLure's execution, except subject to appellants' lien thereon.

(c) *Execution Lien.*

It must be remembered that respondent McLure's judgment was entered in January, 1902. The record discloses that nothing further was done in the case until 1907, when execution was issued. This execution is not a part of the record of this case, but the marshal's return on the execution is attached to appellant's answer. This return shows no levy of the execution at all. It simply states that "on the 1st day of February, A. D. 1907, at

Neihart, Cascade County, Montana, under and by virtue of said writ of execution, I levied upon certain real estate standing upon the records of Cascade County, State of Montana, in the name of the defendant mentioned in said writ and now *in the possession of the United States marshal of Montana by virtue of an attachment theretofore on the 16th day of December,* 1901, *levied,* which real estate is particularly described in the notice hereto attached marked Exhibit "A." (Record, page 61-62). The marshal then recites the posting and publication of the notice of sale.

As above stated, if respondent McLure then had an attachment or judgment lien on the premises, no execution levy was required. He does not return that he made any levy under the execution, but simply advertised and sold property upon which he returns that he had levied an attachment, and which was in his possession under such levy.

The statutes of Montana require that the execution must be levied in the same manner as a writ of attachment, (Sec. 6821 Rev. Codes). We have quoted the statutes relative to the levy under a writ of attachment. If the levy under execution is governed by the same statutes there can be no question but that, if the marshal attempted any levy under the execution, such levy was absolutely void. He does not even return that he *"duly"* or *"legally"* levied (which under the statutory presumption of the regularity of official acts might be *prima facie* sufficient), but simply, that he levied on certain property which was in his

possession under an attachment theretofore levied. He does not return that he filed with the county clerk, a copy of the writ of execution, the description of the property levied, and a notice that it had been levied upon, as required by the statutes.

We must conclude that respondent McLure had no lien upon the Equator lode claim at the time of the pretended sale by the marshal either under any levy of attachment or execution and that he had no judgment lien thereon, except subject to the attachment lien of appellants.

Therefore it follows as a matter of law that the marshal could only sell the interest of the Diamond R. Mining Company in the Equator claim as it stood when the judgment lien attached, which interest was subject to appellants' attachment. If the marshal sold this claim at all, such sale could only be made subject to appellants' attachment lien and before complainant was entitled to enjoin the enforcement of appellants lien by sale under execution, the complaint *must* have shown that appellants' lien had been extinguished.

(d) *The Sale.*

Appellants have alleged in their pleadings that the marshal never offered the Equator claim for sale, or sold the same. His return to the execution is conclusive evidence against him and Respondent McLure, of his acts under the execution. The statute requires a return of the execution to be made and filed in court, which becomes a part of the judgment roll (Sec. 6816 Rev. Codes) and is the only court record of his acts under the execution. This return under

the law must contain a statement of what he did under the execution, and neither the marshal nor respondent McLure can contradict it. This return states, after the recital of the posting and publication of notice of sale, that "the sale of said goods and chattels not being sufficient to satisfy said execution, I did at eleven o'clock a. m. of said 26th day of February, 1907, at Neihart, Cascade County, Montana, on the premises of the said Diamond R. Mining Company, offer for sale at public vendue to the highest bidder for cash *the real estate described in said notice of sale of real estate hereto attached and marked Exhibit "A" and advertised and sold the same and the whole thereof* in two lots as follows." (Rec. page 63.) He then recites that he sold lot No. 1 to respondent McLure; then recites that lot No. 2 being all the rest, residue and remainder of said real estate so levied upon and advertised for sale together with the tenements, hereditaments, fixtures and appurtenances thereunto belonging and appertaining as described in said marshal's notice of sale of real estate hereto attached, referred to and designated as Exhibit "A" and the deeds and records therein referred to, and then and there exposed and offered for sale at public vendue in one lot as aforesaid.

It is apparent from the foregoing return that the marshal only offered for sale or sold the property described in the notice of sale, a copy of which is attached to the return as Exhibit "A". It is therefore important to examine Exhibit "A" and ascertain what property was therein described. It will be noticed that the only property de-

scribed in the notice of sale is the exact property described in the return to the writ of attachment hereinabove referred to. It does not specify the Equator lode in any way or manner. It does specifically name the other lode claims which were sold, and certain lots on the Frisco claim and certain other property. It then says "certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by the deeds to L. S. McLure dated June 9, 1899, used for concentrator site." The language above quoted is the only part of the notice of sale in which by any possibility the Equator lode claim could be included, because all the other property specified in said notice is particularly and definitely described. How can it be contended that the marshal sold the the Equator lode claim under this description? But counsel in the court below says that he not only sold the property described in Exhibit "A" but the property described in "the deeds and records therein referred to." Suppose he did. The only deed referred to is that to L. S. McLure dated June 9, 1899, showing certain vacated streets and alleys used for concentrator site.

In the return to the writ of attachment the marhsal does not state the names of the grantors to this deed; does not state that the deeds are recorded, and if recorded, in what book and at what page in the records of Cascade County they appear. There is no way, from the language above quoted, of possibly ascertaining whether said lode claim consisted of "certain vacated streets and alleys * * * * used for a concentrator site." There is no

mention in the return of sale that the Equator claim was ever laid out or platted as a townsite or addition thereto. The return does show that the Frisco claim had been so laid out and we contend that, having used the language above quoted in his return to the attachment and the notice of sale immediately after stating the lots and blocks in the Frisco claim, which would be sold, this language should be held to refer to certain vacated streets and alleys in the Frisco claim. He advertised for sale and sold the lots and blocks in the Frisco claim and is it not a fair presumption that the vacated streets and alleys which he sold were the vacated streets and alleys in the Frisco claim within the boundaries of the blocks sold by him.

As above stated the only paper relative to what is done under an execution which becomes a part of the record of the court is the return of the officer of what he did under the execution. True, the statute requires the officer to give to the purchaser a certificate of sale and after the time for redemption is expired and no redemption made, a deed. But for the purpose of determining his action under the execution the records of the court must control, and if there is any variance between the certificate and deed and the return to the execution, as to his acts thereunder, the return must control. He is only entitled to give the certificate and deed for the property actually sold by him on the execution, and to determine what property has been sold, we must look to his return which is conclusive both upon him and the purchaser at the sale.

We are, however, inasmuch as respondent McLure relies solely and exclusively upon the certificate of sale and the marshal's deed and has attached the certificate to his complaint, entitled to examine the certificate and compare its language with the return on execution for the purpose of determining any matter in conflict between such return and such certificate. An examination of the certificate will conclusively disclose that the Equator lode claim was not sold under "certain vacated streets and alleys." The certificate of sale discloses that the marshal first sold "the bed of all those portions" of certain streets and alleys. It then continues: "and also that portion of the Equaotr lode claim which was heretofore conveyed to L. S. McLure by John McCassey and H. J. Skinner by deed duly recorded in the office of the county clerk and recorder of said Cascade county, State of Montana." The fact that the last quotation is all in one sentence and is separated from the description of the property first sold, permits us to insist that a portion of the Equator lode claim was all that was conveyed by the deed referred to and that this deed did not convey to McLure any vacated streets and alleys. He therefore first sold other real estate levied upon and advertised, then the beds of certain streets and alleys and then certain portions of the Equator lode claim which had been conveyed to L. S. McLure under a deed by cretain parties recorded in the office of the County Recorder. He does not give the date of this deed and does not state the book and page whree it was recorded. The deeds referred to in the return to the attachment and in the re-

turn to the execution are deeds given to L. S. McLure dated June 9, 1899, which show certain vacated streets and alleys. This return does not mention seed deeds as showing "any portion of the Equator lode claim;" the deed mentioned in the certificate of sale is only referred to for the conveyance of a portion of the Equator lode claim. There is no similarity in the reference to these deeds other than the name of the grnatee. The deeds mentioned in the returns are said to have been dated June 9, 1899, but no mention is made of the recording of the same, nor the names of the grantors given, while in the deed mentioned in the certificate of sale the names of the grantors are given and a statement made that the deeds are recorded, but no reference is made to the record of such deed. More than one deed is mentioned in the returns and but one deed mentioned in the certificate of sale.

We submit that it would be a very violent presumption to hold that the deed mentioned in the certificate of sale by certain parties as conveying a portion of the Equator lode claim is the same paper as the deeds mentioned in the marshal's returns as *showing* certain vacated streets and alleys. It would be substituting for the *deeds* mentioned in the returns a single deed and would also substitute a deed conveying *other property.*

The statutes relative to the giving of a certificate of sale should also be considered. It is section 6836 of the Rev. Codes and provides that "upon a *sale* of real estate the purchaser is substituted to and acquires the right, title, interest and claim of the judgment debtor thereto * * *

The officer must give to the purchaser a certificate of sale containing: One, a particular description of the property sold. * * * A duplicate of such certificate must be filed by the officer in the office of the county clerk." Under this section the officer has no power to give to the purchaser a certificate of sale covering any property except that actually *sold* by the officer under his execution. The statute does not contemplate that the officer should by the certificate of sale state his acts under the execution, but only state what property he actually sold under the execution. What he sold must be determined by his return to the execution.

By the certificate of sale the purchaser is substituted and acquires "*the right, title, interest and claim of the judgment debtor thereto.*" This excludes the idea of anything else passing by the certificate or by the deed given in pursuance thereof. Therefore, even if the marshal actually sold the Equator lode claim if appellants had theretofore acquired a prior lien thereon by attachment, the sale and certificate would only pass to the purchaser whatever rights the judgment debtor then had in the property.

We submit that the following conclusions indisputably follow from the foregoing argument: 1. That McLure acquired no lien upon the Equator lode claim under his writ of attachment; 2, that he acquired no lien under his writ of execution; 3, that the only lien which he acquired under his judgment was subject to appellants' prior judgment lien; 4, that he did not sell the Equator lode claim

under the execution sale, or, if the court should find that he did so sell said claim, such sale would in law be subject to the prior attachment lien of appellants. Therefore the court below erred in granting a decree enjoining appellants from selling the Equator lode mining claim under their execution.

ESTOPPEL AND RES ADJUDICATA.

It will be noticed that the record discloses that the appellants herein find separate bills in equity, prior to the sale under respondent McLure's execution, seeking to protect their judgments. A copy of one of these bills is attached to the original bill herein, and made a part of this record. It will probably be contended by counsel for respondent that by said bills so filed by appellants, at a date prior to the execution sale, appellants are now estopped from asserting that the Equator lode claim was never levied upon by respondent McLure, was never sold by him, or that his judgment lien was subject to appellants' attachment lien.

We submit, however, that, if counsel for respondent presents such argument, it will be because they are confused as to the effect of the filing of said bills and as to the allegations thereof. Those bills were filed as independent suits. No doubt but the allegations therein were judicial admissions or their equivalent, *in that case*. Appellants could not, therefore, have contradicted such allegations without amending their bills by leave of court. But those suits are ended and the force and effect of all

the allegations of the pleadings ended with the suits. True, such allegations might be considered an evidence in this suit, if offered, but they would have no conclusive effect and might be contradicted by appellants.

2 Wigmore on Evidence, Sec. 1065.
Solomon R. R. Co. vs. Jones, 2 Pac. 657.
Buzzard vs. McAnulty, 14 S. W. 138.
Blanks vs. Klein, 53 Fed. 436.

(a) *Estoppel.*

The rule might be otherwise in case an estoppel arose upon such allegations, and such estoppel were pleaded and insisted upon. An estoppel, however, cannot arise, unless respondent McLure, because of our allegations, believed the same to be true and relied thereon to his injury.

Neither would it arise unless it is alleged by respondent McLure in his bill that he had not the same means of ascertaining the truth of the facts alleged by appellants as they had.

All these matters being necessary to affect an estoppel, must be clearly pleaded in the complaint and the estoppel claimed before it arises. No allegation is made in the original bill herein, that any of these necessary elements exist.

Appellants' allegations in the former bills of complaint have not been pleaded or claimed as an estoppel. It is a fundamental principle that an estoppel must be pleaded if relied upon. Pleading an estoppel is alleging the existence of facts out of which it arises, which includes the facts that the allegations were made; that the parties

claiming the estoppel believed them to be true; that they relied and acted upon them to their injury, and that they did not have the same means of ascertaining the truth of the allegations as the parties making them. The complaint is barren of any of these allegations, except that appellants filed certain bills, one of which it attached as an exhibit.

(b) *Res adjudicata.*

Counsel may also contend that the decrees entered in the above mentioned suits are res adjudicata on the questions sought to be raised in this suit.

It has been uniformly held by the Federal courts that in order that a former decree or judgment shall be res adjudicata, such decree or judgment must have been entered in a suit between the same parties, or their privies; that the issues in the two suits must have been identical; and that it must clearly and positively appear from the record itself, that the precise point or question in issue in the second suit was involved and decided in the first.

It is also well settled that a matter in issue in the former suit which was neither pleaded nor brought into contest therein, although within the general scope of the litigation and which might have determined the judgment, if it had been set up and tried, is not res adjudicata; also if a particular point was not in issue in the former suit, either on the face of the pleadings or in the sense of being actually tried as the precise question in the case, is not included for the purpose of subsequent suit on a different cause of action;

and that a judgment is not conclusive on any point or question which from the nature of the case or the character of the pleadings could not have been adjudicated in the suit in which it was rendered.

All of these principles have become settled law in the Federal courts and no citation of authorities would seem to be necessary.

Testing the suits above referred to by these rules, we must conclude that the decrees are not res adjudicata on the questions here referred to. An examination of the bill of complaint of the Great Falls National Bank will disclose that those suits were based upon the fraudulent acts of respondent McLure and upon an unlawful conspiracy between McLure and the Diamond R. Mining Company and its officers, to defraud appellants of their respective judgments. The theory of complainants was that by the actions and conduct of McLure and the Diamond R. Mining Company and representations to the appellants, any lien which he might have had upon the property of the Diamond R. Mining Company was equitably postponed to the liens, claims and judgment of the appellants. Appellants prayed that the liens of McLure be postponed until they had obtained liquidation of their respective judgments, out of the property; that McLure's sale be enjoined until such liquidation was had, and that they be allowed to proceed with the sale of sufficient of the property of the Diamonr R. Mining Company to pay their judgments. It will be noticed that no question is raised as to the validity of McLure's lien under his attachment

or as to his judgment lien, or as to what property was covered thereby. The suits were brought upon the theory, that, admitting that McLure had a prior lien of record on all the property of the Diamond R. Mining Company, such lien should be made subject and subservient to their judgments. Such were the questions involved in these suits, and the court decided that appellants were not entitled to the relief aske don the ground of want of equity in their bills. And allegations to the effect that McLure failed to levy on the Equator; that his judgment lien on that claim was subject to their attachment lien, would have been entirely inconsistent with the theory upon which the said bills were framed. The theory of the bills being that, admitting that McLure had levied upon all the property of the Diamond R. Mining Company and that his judgment lien was prior upon such property, yet such liens should be held subservient to appellants' liens. The question of whether his attachment was levied upon the Equator claim, or whether his judgment lien thereon was prior or subsequent to appellants' attachments, became entirely immaterial. No matter whether McLure levied his attachment upon the Equator claim, or whether his judgment lien was prior as a matter of law, the only question before the court was whether such lien was prior to appellants' liens as a matter of equity. The court found that it was not and the question as to the actual priority of such lien was never presented or considered.

BURTON vs. KIPP.

In one of the earlier arguments in the court below counsel for respondent McLure, cited and relied upon the case of Burton vs. Kipp, 30 Mont. 275, as sustaining the conclusion that a sale on execution cannot be avoided under the statutes of Montana, even though there was a total failure of the officer making the sale, to advertise the same. An examination of this case, however, discloses its inapplicability to the case at bar. In that case there was an actual prior lien on the property in question and some sort of notice had been given of the sale. But in this case there being no lien upon the Equator claim, except subject to appellants' attachment line, the case of Burton vs. Kipp cannot be relied upon as an authority here.

OTHER ALLEGATIONS OF APPELLANTS' PLEADINGS.

We have not urged upon the court in this brief the effect of the allegations of appellants as to the notice of sale being published on Sunday, or that the property was sold in mass when it should have been sold in parcels. We do not desire, however, to be understood as waiving these claims, but simply do not argue them further for the reason that in our opinion the other grounds of our contention are so conclusive that it will not be necessary for the court to consider such allegations.

IRREGULARITY OF CROSS-COMPLAINT.

We trust the court will not be confused with reference to appellants cross-complaint, because of the manner in

which it was presented. A stipulation was filed with the cross-complaint whereby respondent McLure's solicitors expressly waived any question as to the method of presenting the cross-complaint or the form in which it was drawn. We frankly admit that the cross-complaint herein would probably be insufficient except for this stipultaion. All irregularities with reference thereto were therefore waived by respondent McLure's solicitors and the cross-complaint is to be considered by this court as being in proper form and having been properly filed.

We confidently submit that this court, after a full consideration of all the questions involved and an investigation of the cases cited, will enter a decree in the main suit, reversing the decree of the court below and order complainant's bill of complaint to be dismissed.

CLAYBERG & HORSKY,

Attorneys for Appellants.

No. 1717.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK, a corporation, AMERICAN ENGINEERING WORKS, a corporation, and ED. HOGAN, as sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

IRA T. WIGHT,
CHARLES E. PEW,
Solicitors for Appellee.

Naegele Printing Co., Helena, Mont.

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vs.

CHARLES D. McLURE,

Appellee.

BRIEF OF APPELLEE.

While the statement of the case contained on pages 1 to 11 inclusive of appellants brief is substantially correct, as far as it goes, (the statements contained on page 12 thereof being merely conclusions of counsel) yet there are certain allegations contained in the pleadings in this case which are not referred to in that statement, and which we shall desire to bring to the Court's attention in the course of our argument.

We will accordingly preface our brief with a statement of the additional facts which we deem pertinent.

The marshal's return of execution in the case of McLure vs. Diamond R. Mining Company contains the statement:

> "Lot No. 2, being all the rest, residue and remainder of the said real estate so levied upon and advertised for sale together with the tenements, hereditaments, fixtures and appurtenances thereto belonging or appertaining, as described in said marshal's notice of sale of real estate hereto attached, referred to and designated as Exhibit A, *and the deeds and records therein referred to,* I then and there exposed and offered for sale * * * and thus sold the same to said Charles D. McLure, for $120,000.00, that amount being the highest bid therefor, and the bid of Charles D. McLure."
>
> Record pp. 63, 64.

The certificate of sale issued by the marshal to Mr. McLure, under the sale referred to in the return above quoted, also contains the words:

> "And also all that portion of the Equator Lode Mining Claim, which was heretofore conveyed to L. S. McLure by John McAssey, and H. J. Skinner, by deed duly recorded in the office of the County Clerk and Recorder of the County of Cascade, State of Montana, and by said L. S. McLure conveyed to Diamond R. Mining Company."
>
> Record page 19.

It appears that the Marshal's certificate of sale was recorded in the office of the County Clerk and Recorder of Cascade County, Montana, on May 1st, 1907.

Record page 20.

The complaint in the old suit of Great Falls National Bank against Charles D. McLure and others, a copy thereof being attached to the complaint herein and marked Exhibit B (Record page 21 et seq.) alleges that on the 16th day of December, 1901, Mr. McLure obtained the issuance of a writ of attachment in the suit of McLure against the Diamond R. Mining Company, and that under said writ the United States Marshal levied "upon certain real estate in Cascade County, belonging to said defendant Diamond R. Mining Company, and described in said notice (referring to the notice of attachment, a copy thereof being shown at pages Nos. 38 and 39 of the record) * * * that the defendant Diamond R Mining Company had not then nor has it now any other property than the said property so attached."

Record page 23.

And again, that "the said Charles D. McLure did nevertheless institute the aforesaid action and as hereinbefore set forth, levy upon and attach all the property of every kind and character belonging to the said defendant Diamond R. Mining Company."

Record page 28.

The cross bill of appellants alleges that "the said United States Marshal did proceed with the service of said writ (referring to the writ of execution in the case of McLure against the Diamond R. Mining Company) by advertising for sale all the real estate and personal property theretofore attached in said action as aforesaid; * * * that all of the real estate so levied upon and advertised for sale was on the 26th day of February, 1907, sold by the said United States Marshal to the said Charles D. McLure, who thereupon received from said United States Marshal a certificate of sale, which is complainant's Exhibit A aforesaid, and is made a part hereof."

Record page 53.

We wish to observe in passing that the statements contained on page 12 of appellants brief are in the nature of argument, and are only entitled to be treated as such. It is a mere statement of the conclusions of counsel, and has to do with the ultimate questions before this Court for decision. We here go on record as not admitting any statements there contained.

We will discuss the questions presented by the record in the following order:

1. The order sustaining the demurrer to the cross bill.

2. The decree on bill and answer.

I.

DID THE COURT BELOW ERR IN SUSTAINING THE DEMURRER TO THE CROSS BILL?

It is well established that the marshal's deed is prima facie evidence of the truth of its recitals, especially where a valid judgment and execution are proven.

Schroeder vs. Pehling, 108 N. W. 252.

Eland vs. Cameron, 31 N. Y. 115.

Bowersock vs. Adams, 41 Pac. (Kan.) 971.

17 Cyc. 1285 and note 10.

17 Cyc. 1287 and note 20.

The defendants, (appellants here) have attempted to dispose of the burden which rests upon them to show that the deed is void as to the Equator lode, by making certain contentions as to the proceedings leading up to the deed, namely, the attachment, judgment lien, levy of execution, notice of sale and sale. We shall treat these propositions in the order named.

(a) The attachment and judgment lien.

The cross bill alleges that McLure never attached and that his judgment in the suit against the Diamond R. Mining Company never became a lien upon the Equator lode.

In the first place, there is only the allegation by the defendants that the Equator Lode was not attached. A copy of the notice of attachment is annexed to the Marshal's return of attachment, and is shown in the record (Record pp. 38 and 39).

It will be observed that that notice, like the notice of sale (Record pp. 66 and 67) contains the paragraph:

> "Certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for concentrator site."

We submit that the only way for the defendants to raise an issue as to whether the Equator Lode was attached is to allege that the Equator Lode was not covered by the ground referred to in the deeds mentioned in the notice of attachment. All property mentioned or referred to in the notice of attachment was attached (Sec. 6662 Rev. Codes Mont.); subject to the right of any person who might be prejudiced by the indefiniteness of the notice to object to it on that ground. Defendants have never alleged in any of their suits that the notice was indefinite in that regard, nor that they had been prejudiced or misled by it; but on the contrary they show all the way through that they know and have always known that the Equator Lode is covered by the ground described in the deeds referred to in that notice.

The argument and authorities contained herein, un-

der our discussion of the sale (infra), apply with equal force here, and we hereby refer to them.

The authorities cited by counsel for appellants on page 23 of their brief, with reference to the effect of a return of an officer, have no application here. They apply only to cases where the *truth* of its recitals is questioned. The only objection made here is that it is indefinite.

We contend, moreover, that the defendants (appellants here) cannot at this time deny that McLure's attachment did cover the Equator lode. The bank alleged in its former complaint (Exhibit B to complaint herein) that on the 16th day of December, 1901, in the case of McLure against the Diamond R. Mining Company, the United States Marshal levied "upon certain real estate in said Cascade county belonging to said defendant Diamond R Mining Company, and described in said notice and did also in pursuance to said writ on the 18th day of December 1901 attach and levy upon certain personal property belonging to said defendant company in said county * * *; that the defendant Diamond R Mining Company had not then nor has it now any other property than the said property so attached." (Rec. p. 33).

Again it is alleged in that complaint, that on the 17th day of December, 1901, in the case of the Great Falls National Bank against the Diamond R Mining

Company, the sheriff of Cascade county levied upon "all and singular the same and identical real estate and appurtenances aforesaid, including the concentrator building, power house and all other buildings situated upon and appertaining to said real estate." (Rec. p. 25).

And again that "the said Charles D. McLure did nevertheless institute the aforesaid action and as hereinbefore set forth levy upon and attach all the property of every kind and character belonging to the said defendant Diamond R. Mining Company." (Record p. 28).

In the face of these allegations we are unable to see how the defendants can be heard to say that the Equator lode was not attached. The allegations contained in that former complaint have not been in any way explained by defendants, even supposing they would be permitted to explain, and they must be taken as true in this proceeding, and any contradictory allegations in the present suit disregarded.

> "Any confession or admission made in pleadings in a court of record, whether it be express or implied, by pleading over without a traverse, will forever preclude the party from afterward contesting the same fact in any subsequent suit with his adversary. This is the definition of estoppel by matter of record."
>
> Sullivan vs. Colby, 71 Fed., 460.

The same principle is announced in

Davis vs. Wakelee, 156 U. S. 680.

We submit that the defendants are estopped by their former allegations. The complaint in the former suit was verified. (Rec. p. 37).

This is a suit in equity and we submit that it would be violative of every principle of equity to permit a party to swear to one state of facts and seek relief upon that basis and when he fails to recover upon that ground, reverse his postition and seek relief in a new action upon a verified complaint which alleges a contradictory statement of facts, at least without such allegations being accompanied by some reasonable and satisfactory explanation.. The sacredness of an oath should be observed as carefully in pleadings as upon the witness stand, especially in a court of equity.

The former complaint was pleaded in our complaint and appellants had plenty of opportunity to explain it if those allegations were made through excusable mistake or neglect. This they have not attempted to do, however, and we submit that under the authorities, they are estopped by those allegations.

It is needless to cite authorities also to the effect that defendants were estopped not only as to the matter expressed set up in the former suit, but also as to matters properly triable in that suit, whether raised by them or not. They knew what the notice of attach-

ment contained in 1901, it being a matter of record; but they made no mention of the points here urged in their former suit und have stood by for seven years without atempting to take advantage of the alleged imperfections. They have therefore by their laches forfeited any right they may have had to complain.

It is not necessary, however, for us to rely upon the ground above stated, for all liens acquired by the Bank, whether by attachment or by judgment, upon any of the property of the Diamond R. Mining Company expired on February 12th, 1908, and McLure's title became perfect as against the Bank.

The Montana statute in force at all the times herein mentioned, provides that judgments of District Courts (being courts of general jurisdiction) become a lien upon all the real property of the judgment debtor within the county from the date of docketing and that such lien continues for six years.

Sec. 6807, Revised Codes of Montana.

The Federal statute provides that judgments or decrees of any circuit or district court of the United States shall become a lien upon real property within the district to the same extent as judgments of courts of general jurisdiction of the state, without the necessity of their being docketed in any particular county,

unless the statutes of such state provides for such docketing.

25 Statutes at Large, 357.

4 Fed. Statutes, Anno., 5.

There was at that time no statute of the state of Montana providing for the docketing of judgments of the federal court in the county where the real property sought to be affected was situated.

McLure's judgment therefore became a lien upon all of the real property of the Diamond R Mining Company on January 16th, 1902. This is conceded by appellants in their brief (Appellants' Brief, p. 29).

The Bank's judgment, being entered on February 12th, 1902, became a lien on all that property on that date, subject however to McLure's attachment and judgment lien, except as to any priority it (the Bank) may have obtained by its attachment. The attachment lien, however, merged in the lien of the judgment, and expired with it. The lien of the Bank's judgment expired on February 12th, 1908.

The sale under the McLure judgment on February 26th, 1907, therefore became absolute beyond all controversy upon the expiration of the lien of the bank's judgment on February 12, 1908.

Bagley vs. Ward, 37 Cal., 121.

In that case the court held that "when a judgment

is rendered and becomes a lien upon the real property attached, the lien of the attachment is merged in that of the judgment, and does not revive upon the expiration of the two years' lien of the judgment." (The lien of the judgment in California being but two years at that time.)

Bagley vs. Ward, supra.

It is therefore unnecessary to consider the question of the priority of the attachment of the Equator lode, as the attachment ceased to be a factor when the bank's judgment lien expired.

Sklower vs. Abbott, 19 Mont., 228, cited by appellants, has no application to this case. It was a case where both parties had subsisting liens, and the question presented was merely one of priority. Here, the bank's lien became dormant on Februray 12th, 1908, about nine months before execution was levied under that judgment against the Equator lode.

We submit that there is no merit in appellant's assertion that McLure's judgment never became a lien upon the Equator lode, nor is there any efficacy in their claim that McLure never attached that lode.

As to the judgment of the defendant American Engineering Works, its suit was started and its judgment was entered over two years after McLure's judgment became a lien upon the property, and of course was subject to it; therefore is not necessary to be considered.

(b) Levy of execution.

It is also alleged that the marshal never levied on the Equator Lode under the execution.

We have already shown that the McLure judgment was a lien upon the Equator Lode at the time of the sale on February 26th, 1907. No "levy" was necessary; the execution merely serving the purpose of a power of sale under the judgment lien.

> "The doctrine of Wood vs. Colvin 5 Hill, 228, that a jndgment being a lien upon the land, a levy is unnecessary, that the judgment binds the land, and the execution comes as a power to sell, is often cited with approbation and is, we think, the correct rule."

Bagley vs. Ward, 37 Cal., 121-132.

> "In several essentials the effect of the execution must be different from a fi. fa. levied upon personal estate only. The delivery of the fi. fa. gives no new right to the plaintiff and vests no new interests. The general lien is created by the judgment and the execution is merely to give that lien effect—not by vesting a possessory right to the land affected by it in the plaintiff, but by designating it for a conversion into money by the operation of a fi. fa. and the act of the sheriff by virtue of it."

Catlin vs. Jackson, 8 Johns. 548.

> "Under Code Civ. Proc. Sec. 691, levying an execution on land subject to the judgment lien it is

not necessary that the Sheriff file a copy of the writ with the recorder of the county, a description of the property levied upon, or a notice that it is levied on, as in the case of land attached. Id. Sec. 688."

Lenhardt vs. Jennings, 51 Pac. (Cal.) 195.

Appellants say, on page 31 of their brief, that the writ of execution must, under the provisions of Section 6821 of the Revised Codes of Montana, be levied in the same manner as a writ of attachment. Section 688 of the California Code, referred to in the case last cited, is identical, word for word, with Section 6821 of our Code, and contains the provision that property "both real and personal" etc., "may be attached on execution in like manner as upon writs of attachment." This applies only to property upon which the judgment is *not* a lien.

Holter H. Co. vs. Ontario M. Co., 24 Mont. 193.

Lean vs. Givens, 81 Pac. (Cal.) 128.

"Where the judgment is a lien on the land there is no real necessity for a formal levy, as it adds nothing to the effect of the sale on execution. (Citing Lenhardt vs. Jennings, *supra.*)"

Lean vs. Givens, *supra.*

(c) Notice of sale.

It is alleged that the marshal never advertised the Equator Lode for sale; that is to say, that the Equator Lode is not named in the notice of sale.

In the first place, the judgment debtor is the only one who could object to lack of notice.

Freeman on Executions, Sec. 286.

In the second place, it is conclusively established in Montana that under the Montana statute the failure of the officer to give notice of sale of real estate does not affect the validity of sale, but gives any injured person a cause of action against the officer for damages.

Burton vs. Kipp, 30 Mont., 275.

The court there held that:

> "Under the Code of Civil Procedure, Section 1225, prescribing the notice to be given of sales under execution, and section 1226 providing that an officer selling without the notice prescribed shall forfeit $500 to the aggrieved party in addition to his actual damages, failure to give the notice does not invalidate the sale, the remedy provided being exclusive."

The same rule is established in California.

Smith vs. Randall, 6 Cal., 47.

Frink vs. Roe, 70 Cal., 296; 11 Pac. 820.

Counsel for appellants assert that the case of Burton vs. Kipp has no application to the case at bar, saying that in that case there was some sort of notice. They have evidently failed to examine that case carefully, for on page 286 and 287 the court said:

> "It will be observed that the allegaion of want of notice in the complaint is also pregnant with the admission that some sort of notice was given but *assuming the allegation to be sufficient to present an issue on this point, was the sale therefore void?* o o A preponderance of authorities is in favor of the view that a requirement as to notice is directory only and that the *failure to observe it* does not avoid the sale as against a purchaser who is himself free from fault."

It will be seen therefore that the decision was based upon the assumption that no notice was given and has the broadest application possible.

(d) The sale.

There remains for discussion under this head but one more point, namely the contention of appellants that the marshal did not sell the Equator Lode. In support of this propostion the defendants (appellants here) plead the marshal's return, a copy thereof being made an exhibit to the amended answer and cross bill. They content that the Equator Lode was not sold be-

cause the marshal did not specifically describe it in that return.

While an affirmative statement in the marshal's return showing that the Equator Lode was *not* sold might, in the absence of an amendment or satisfactory explanation, be deemed conclusive, it is well established, however, that a mere failure of the officer to go into details in his return is no evidence at all.

> "The last objection rests upon the ground that the return endorsed upon the execution does not contain a report in detail of the acts of the officers in making the levy. It was not neccessary that it should. If the return be defective for the reason suggested *or for any other reason,* the purchaser would not be affected. Whether the return be good or bad, sufficient or insufficient, it is a matter of no moment to the purchaser, for his title depends upon it in no respect whatever."

Hunt vs. Louces, 38 Cal., 382.

Therefore unless the marshal's return affirmatively contradicts the certificate of sale and deed, the deed must be sustained.

The return cites, among other things, that "Lot Number Two (2), being all the rest, residue and remainder of said real estate as described in said marsahl's notice of sale of real estate hereto attached, referred to and designated as Exibit A, *and the deeds and records therein referred,* I then exposed and offered for sale," etc. (Rec. pp 63-64).

Attached to the return is a copy of the notice of sale, which makes no specific mention of the Equator Lode, but after describing certain pieces of property, includes "certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for concentrator site."

In view of these statements in the marshal's return, it must be conceded by counsel that in the absence of an allegation by defendants that those "deeds and records" do not describe the ground covered by the Equator Lode there is no issue presented as to whether the Equator Lode was actually sold.

What property was described in those deeds and records?

The only evidence we find in the record before this court bearing upon that question is the marshal's certificate of sale and the deed. The marshal's certificate of sale states that he sold (among other property):

> "All that portion of the Equator Lode mining claim which was heretofore conveyed to L. S. McLure and John McAssey and H. J. Skinner by deed duly recorded in the office of the County Clerk and Recorder of said County of Cascade, State of Montana, and by L. S. McLure conveyed to Diamond R. Mining Company." (Record p 19).

This certificate, being authorized by statute, is admissible as evidence.

Sec. 6836, Rev. Codes Montana.

Lindsay vs. Chicago, 3 N. E. (Ill.) 443.

Holmes vs. State, 18 So. 529.

1 Elliott on Evidence, Sec. 415.

The complaint alleges and the answer admits that the deed conveyed the same property described in the certificate of sale.

The presumption is that official duty has been performed.

Revised Codes of Montana, Sec. 7962.

Burton vs. Kipp, 30 Mont., 288.

"This presumption must be indulged until rebutted by sufficient allegation and proof."

Burton vs. Kipp, supra.

The presumption therefore must be that the marshal's certificate states the truth for there is nothing in the return which contradicts it and under the pleadings appellants contentions are all based upon the marshal's return.

It is to be noted that the defendants did not produce a copy of the deed to L. S. McLure to show that it does not describe the Equator Lode, nor do they claim that they searched the records for such deed and could not find it. If they could show by that deed that the ground covered by the Equator Lode was not

described in those "deeds and records", their defense as to the Equator Lode would have some foundation.

We respectfully submit that the court below was right in sustaining the demurrer to the cross bill. Appellants complain that they were not allowed an opportunity to file an amended cross bill after this demurrer was sustained (Appellants Brief 15).

The court below evidentliy decided that under the allegations of the previous complaint the appellants were not enabled to amend. Nor did appellants tender an amended cross bill and ask leave to file.

II.

DID THE COURT BELOW ERR IN RENDERING JUDGMENT FOR PLAINTIFF ON THE BILL AND ANSWER.

The only issues raised by the answer are as to the ore bins, blacksmith shop, tramway and corner of power house. The defendants apparently attempted also to raise the question of the sufficiency of the proceedings and the deed to pass title to the Equator Lode. It is well settled that the deed cannot be collaterally attacked, especially where the validity of the judgment and execution are established. We are relieved, however, of the necessity of discussing the proposition, because that feature of the answer was abandoned by the appellants when they filed their

cross bill; and the questions have been fully discussed under that head.

We note that the appellants have not argued the questions sought to be raised as to the ore bins, etc., and possibly it is not necessary for us to do so. We desire, however, to discuss all the points presented by the pleadings, so as not to be taken by surprise.

The allegations of the bill and answer in regard to the ore bins, etc., may be briefly stated as follows: The bill alleges that the ore bins, etc., are used in connection with and are fixtures of the mines (Rec. p 9). The defendants deny that they are such fixtures. The answer also denies that the marshal levied upon or sold the above mentioned property (Rec. p. 48).

As hereinbefore shown, the bill of complaint in the former suit alleged that McLure attached *all* the property belonging to the Diamond R. Mining Company; it is conceded that he sold under this judgment all the property attached. It is alleged also that "the property attached in said cause consists of the defendant company's mines and also the *flumes, pipes, cars, blacksmith shop, concentrating mill and other machinery and tools* used in working the same; that *the value of the same, owing to its peculiar nature, is dependent upon its being kept together and used and operated as one plant.*"

Record P. 33.

Under the statutes of the state of Montana, "sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills and all other machinery or tools used in working or developing a mine are to be deemed affixed to the mine."

(Sec. 4428, Revised Codes of Montana).

It will be noticed that the answer contains the statement that the "said United States marshal never at any time levied upon or advertised for sale or sold the ore bins, blacksmith shop, or a portion of the power house or tramway, all of which were and are a personal property." (Rec. p. 48).

And again "that the United States marshal also levied upon and attached all the personal property of the said defendant Diamond R. Mining Company under said writ of attachment (referring to the writ of attachment in the cause of McLure against the Diamond R. Mining Company.) (Rec. p. 52).

Also in the cross complaint in this suit "That the United States marshal did proceed with the service of said writ (of execution) by advertising for sale *all* the real estate and personal property theretofore attached." (Rec. p. 53).

As we have heretofore shown, the bank is bound by these allegations.

Sullivan vs. Colby, 71 Fed. 460.

Davis vs. Wakelee, 156 U. S. 680.

Defendants are not only bound by what was actualy included in that complaint, but by any issue which might have properly been raised. They were familiar with all the conditions at that time or could have been by the exercise of ordinary diligence. That suit was brought for the very purpose of establishing the al-leged priority of the lien of the bank upon the mining company's property. That was the time to bring up the points here urged, and having not only failed to do so, but affirmatively alleging the contrary of the propositions set up in the amended answer and cross bill, defendants cannot now be heard to contradict themselves.

As hereinbefore shown, all our remarks with reference to the bank apply with equal force to the defendant Engineering Works.

Appellants devote considerable space in their brief (page 24, et seq.) to speculation as to what interest the Diamond R. Mining Co. may have had in the vacated streets and alleys. We cannot see how that question can interest this Court in any way, as there is no issue presented anywhere in the pleadings as to the extent of that interest.

Under the head of "Estoppel and Res Adjudicata," counsel for appellants, in discussing the effect of the former allegations, argue that while their former

allegations may be used as evidence in this suit, they may, however, be contradicted, and cite Wigmore on Evidence and several cases (Page 40 of their Brief).

The most that is held in the decisions cited by counsel is that admissions in pleadings in another suit are not conclusive, but may be explained. Even so, appellant's position is not improved. They admitted in their answer that Exhibit B to our bill of complaint is a true copy if their former complaint, but make no explanation of the allegations which clash so harshly with their present position. Having had an opportunity to explain and having failed to do so, their former statements under oath become conclusive.

Counsel refer to 2 Wigmore on Evidence, Sec. 1065. The rule is stated in that section that an answer in chancery may be used as a judicial admission "for it was solemnly sworn to as importing sincere and unqualified avowals." The only case where original bills in chancery were not admitted as freely as answers was where they were not required to be sworn to.

It was held in

Doe vs. Ross, 5 All. N. Br. 346;

that where a bill in chancery is sworn to it has the same weight as a verified answer, upon the principle that when the reason for the difference in the

rule ceases, the difference also ceases and the court admitted a verified petition in evidence.

See also 2 Wigmore on Evidence, Sec. 1066.

To permit promiscuous and irresponsible pleading and allow parties to change their positions in court to suit the varying needs of the hour would be to throw the door open to endless litigation.

The bill in the former suit is properly before this court, and in the absence of a satisfactory explanation of the variance between its allegations and those in the present suit, the former statements must be taken as true. The allegations of that bill which we have hereinbefore pointed out, being of concrete facts, within the knowledge of the defendants when they filed that bill, being matters of record, the rule applies with the greatest force in this case.

Appellants counsel fail to argue the contention as to the allegation that the notice of sale was published on Sunday and the alleged sale *en masse,* but say that they do not waive them. We think they are waived by the failure to argue them but will briefly comment upon these points.

(a) Publication of notice on Sunday.

Such notice would, at the worst, be no notice. As-

suming that to be the case, the question is disposed of by the case of

Burton vs. Kipp, 30 Mont., 275.

(b) Sale *en masse.*

The sale was made in accordance with the written direction of the judgment debtor (Rec. p 64, lines 4 12 inclusive).

There is no doubt that the judgment debtor had the right to direct the property to be sold *en masse,* and as it is not denied that he did so direct, appellant's contention is futile.

Burton vs. Kipp, 30 Mont. 288

> "One who seeks to have a sale *en masse* set aside should show that none of the contentions which would authorize a sale of all the parcels together existed at the time of the sale. The sale may have been *in solido* by the express direction of the judgment debtor or it may have been offered in parcels and no bids received. The judgment debtor may by parole waive the sale of the land in parcels and give authority to sell in mass."

Hudepohl vs. Liberty Hill etc. Co. 29 Pac. (Cal) 1025.

The appellants themselves, however, disposed of this question in advance of the sale, for they alleged in their former complaint, which was filed on February 25th, 1907, the day before the sale was had, "that the

value of the same (referring to the Diamond R. Mining Company's property) owing to its peculiar nature, is dependent upon its being kept together and used and operated as one plant. (Rec. p. 33, first part of Par. 10).

The court below has been harassed by a long series of suits over the property of the Diamond R. Mining Company. After McLure and the Bank had obtained their judgments against the Mining Company, the Bank sat by for five years, acquiescing in the priority of McLlure's lien, but refusing to avail itself of the right of redemption given it by statute. In 1907, however, when McLure obtained the issuance of an execution upon his judgment and proceeded to sell the property, trouble began. The Bank and the Engineering Works filed separate bills in intervention in the old suit of McLure against the Diamond R. Mining Company, which bills were afterwards dismissed by the Court.

A couple of weeks after the dismissal of the bills in intervention, and on February 25th, 1907, the Bank and the Engineering Works filed separate suits in equity in the lower court, seeking to have McLure's judgment set aside. These complaints were dismissed by the lower court and the Bank's case being brought to this court upon appeal, the judgment of the lower court was affirmed. By stipulation, the case of the

Engineers Works abided that decision. In the fall of 1908, the Bank and Engineering Works took another tack, and started out to pick up a few pieces of the property by a sale under their judgments, thereby compelling us to flie our bill of complaint herein to protect our title under the marshal's deed. Upon the hearing upon the order to show cause why the temporary restraining order should not be continued pending the litigation, an order was made so continuing it, which order practically determined all the issues then in the case.

The Bank and Engineering Works thereupon filed another suit in equity to set aside the marshal's deed, which suit was afterwards, by stipulation, consolidated with our injunction suit in the form of a cross blll, and the suits are now before this court on that form.

We submit that there should be some termination to this litigation. If these appellants can be permitted to continue to thresh over this matter indefinitely, without ever becoming estopped, we can see no end to the trouble and expense to which appellee, Mr. McLure, may be put. As a matter of fact, as we have heretofore stated, every matter which has been raised in any of these suits could have been determined in one suit.

Moreover, where as in this case, a junior judgment creditor has the right of redemption, the Courts are very slow to give ear to objections of the character here urged by appellants.

We respectfully submit that the court below was right in rendering judgment on the bill and answer and granting a permanent injunction restraining defendants from in any wise interfering with the property purchased by the appellee under his judgment against the Diamond R. Mining Company.

It will be noticed that the decree in this case is in exact conformity with the notice of sale attached to the marshal's return (Exhibit A A to the Cross Complaint, Rec. p. 61). Of course, appellants cannot complain of the scope of this decree. The court, however, in rendering judgment evidently decided that no issue was raised as to whether the Equator Lode was actually sold by the marshal, or whether the ore bins, etc., were in fact either sold as personal property or were fixtures and appurtenances to the mine. As we have already shown, considering the pleadings in this case in connection with the pleadings in the former suits, no issue was presented upon either of those points, and the court below was therefore right in rendering the decree which it did.

Respectfully submitted,

IRA T. WIGHT,
CHARLES E. PEW,
Solicitors for Appellee.

NO. 1717

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS, (a Corporation), and ED. HOGAN, as Sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

APPELLANTS' REPLY BRIEF.

CLAYBERG & HORSKY,

Attorneys for Appellants.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS, (a Corporation), and ED. HOGAN, as Sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

APPELLANTS' REPLY BRIEF.

In reply to the argument in behalf of the respondent, we shall be as brief and concise as possible.

I.

Counsel announces on page 5 of their brief that the marshal's deed is prima facie evidence of the truth of its recitals, especially where a valid judgment and execution are shown, and cites authorities in support of the proposition. We submit that the court will find, upon examination of these authorities, that none of them are in point.

In the first case cited, the sale had been confirmed by the court and every question involved had been considered before being passed upon In the remaining authorities

we find no reference to a deed upon execution on sale. While the principle announced might be true in a restricted sense between certain parties, yet it certainly cannot apply to a case where the record contains the official return of the officer, on the execution under which the sale was made, which does not support the deed.

We have alleged that the Equator claim was never sold by the marshal under the McLure execution. By setting the case down for hearing on bill and answer, respondent admitted this allegation. If the Equator claim was never sold by the marshal, respondent has no title thereto. A sale is necessary to a conveyance by sheriff or marshal, and if no sale of any particular property is had, the sheriff's or marshal's deed can convey no title to such property.

II.

We shall not take up the time of the court in discussing the validity of the various liens claimed on the Equator lode claim, leaving our former discussion to stand, but shall confine ourselves very briefly to the question as to whether, as shown by the record, the marshal ever sold the Equator claim.

Lest the court should become confused as to the allegations in our former bills of complaint, as affecting this question, we desire to call the attention to the fact that all such bills were filed prior to any sale by the marshal under respondent's execution. They were filed to prevent the sale. No sale having then been made, there could not possibly have been any allegations as to whether the mar-

shal actually sold the Equator claim. Admitting, for the sake of argument, that we would be bound by the allegations in the former bills as to whether or not the marshal levied upon the Equator claim because we alleged in such bills that he had levied upon all the property of the defendant, yet such allegations can have no possible bearing upon the question as to whether the marshal sold the Equator claim under the execution. There is no judicial admission, estoppel, or res adjudicata as to the question of *sale.*

III.

Counsel on page 19 of their brief say:

> "The presumption therefore must be that the marshal's certificate states the truth for there is nothing in the return which contradicts it and under the pleadings appellants' contentions are all based upon the marshal's return."

We submit that this is not a correct statement of the law. The certificate may be evidence of the fact as to whether the sale was made of the Equator claim, but not the only evidence. We might, upon a trial in which the question was as to whether the marshal did sell the Equator claim under the McClure's execution, have introduced parole proof that the Equator claim was never offered for sale or sold by the marshal. This testimony might have been given by witnesses who were present during the entire time the marshal was selling the property under such execution. There can be no doubt that such proof would have been admissible under our pleadings if

the case had been tried on an issue of fact.

We contend that the marshal's return discloses that he *did not sell* the Equator lode claim, and that the certificate describing the Equator claim as having been sold is contradictory of the return. What the marshal did at the sale is the basis of all his subsequent actions. If he did not sell the Equator lode claim, he had no right to include it in the certificate or deed. This was the vital point in issue and we alleged that he did not offer for sale or sell the Equator claim, thereby directly raising the issue, and if the case had been tried upon that issue any competent proof tending to show that the marshal had not offered for sale or sold the Equator claim, would have been admissible, notwithstanding the recitals in the certificate of said sale and the deed.

Counsel further say on page 19 of their brief:

IV.

> "It is to be noted that the defendants did not produce a copy of the deed to L. S. McLure to show that it does not describe the Equator lode, nor do they claim that they searched the records for such deed and could not find it. If they could show by that deed that the ground covered by the Equator lode was not described in those 'deeds and records,' their defense as to the Equator Lode would have some foundation."

No duty devolved on appellants to procure an inspection or copy of the "deed to L. S. McLure," because no reference is made in any of the pleadings, or in the steps of the marshal, to the record to such deed in the office of the County Recorder. As stated in our original brief

there are two classes of deeds to L. S. McLure mentioned in the steps of the marshal, namely; one, dated June 9, 1899, which conveyed certain vacated streets and alleys in the town of Neihart, Cascade county, and the other, a deed executed by John McCassey and H. J. Skinner to L. S. McLure conveying a portion of the Equator lode claim. It is noticable that the date of this last deed is not given nor the place in the record where it might be found. It is further noticealbe that the only property levied upon, had been advertised for sale and sold, according to the return of the marshal, as certain vacated streets and alleys in the town of Neihart, more fully shown by the deeds to L. S. McLure dated June 9, 1899, used for a concentrator side, and that no grantors are named and no reference to the place of record of said deed.

It was not our duty to show that the Equator lode claim was not covered by the deeds mentioned in the marshal's return, but the duty devolved on respondent to show that such conveyance actually covered the Equator lode claim. If the record of certain deeds had been referred to and made a part of the returns of the marshal, the result might have been otherwise.

V.

On page 23 of their brief they say:

> "Appellants devote considerable space in their brief to speculation as to what interest the Diamond R. Mining Co. may have had in the vacated streets and alleys. We cannot see how that question can interest this Court in any way, as there is no issue presented anywhere in the pleadings as to the extent of that interest."

Counsel thus seek, by general statements, to withdraw

the attention of the court from the matter which we conceive to be of great importance. Concededly the marshal under his writ of attachment levied upon certain vacated streets and alleys in the town of Neihart; and concededly this description is the only one under which any levy could be maintained on the Equator lode claim. Conceding, for the purpose of argument, that these vacated streets and alleys were the portion of the Equator claim which the marshal had levied upon, we submit that our argument on page 24 and following of our brief is conclusive that the respondent never obtained any title to the Equator lode claim under such attempted levy and sale. If the marshal only levied upon and sold certain vacated streets and alleys, he could sell nothing under such designation. If such vacated streets and alleys represented the portion of the Equator claim in controversy, his attempted levy and sale of such vacated streets and alleys would pass no title to McLure of the Equator lode claim.

VI.

It makes no difference whether the marshal levied the McLure attachment upon the Equator claim, or whether the lien of the judgment of McLure attached, if the marshal never offered for sale or sold such claim. McLure's judgment was satisfied by the sale actually made, and his judgment lien on the Equator claim expired after such sale was made by the marshal. Therefore it seems conclusive that if the Equator claim was not sold under the McLure execution, it was subject to levy upon by the

appellants' execution issued after such sale and McLure could not enjoin the sale thereof under such execution.

VII.

The court will bear in mind that the controlling question in this case is, after all, whether the marshal sold the Equator claim under the McLure execution. This was an issue of fact directly raised by the pleadings. By respondent's setting the case for hearing on bill and answer and demurrer to the cross bill, he admitted the truth of appellants' allegations, and the bill should have been dismissed.

We submit that the decree appealed from should be reversed and respondent's bill ordered dismissed.

CLAYBERG & HORSKY,

Attorneys for Appellants.

No. 1717.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK, a corporation, AMERICAN ENGINEERING WORKS, a corporation, and ED. HOGAN, as sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

ANSWER TO APPELLANT'S REPLY BRIEF.

IRA T. WIGHT,
CHARLES E. PEW,
Solicitors for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK, a corporation, AMERICAN ENGINEERING WORKS, a corporation, and ED. HOGAN, as sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

ANSWER TO APPELLANT'S REPLY BRIEF.

Appellants state on page 3 of the Reply brief: "Admitting, for the sake of argument, that we would be bound by the allegations in the former bills as to whether or not the marshal levied upon the Equator claim because we alleged in such bills that he had levied upon all the property of the defendant, yet such allegations can have no possible bearing upon the ques-

tion as to whether the marshal sold the Equator claim under the execution." The allegation of their former complaint referred to is as follows: "the said Charles D. McLure did, nevertheless, institute the aforesaid action, and, as hereinbefore set forth, levy upon and attach all the property of every kind and character belonging to the said defendant" (Tr. p. 28).

Counsel then argue that this, however, is not an allegation as to the *sale;* that it could not be—the sale had not taken place when this bill was filed. This is true. The allegation of the former complaint would doubtless be of no consequence in the matter of the allegations regarding the sale, had not appellants by their own allegations in this case bound themselves to it. Appellants admit their former complaint and do not suggest a single excuse or explanation of the allegation with reference to the levy therein contained, and then in their answer and cross bill allege: "that the said United States Marshal did proceed with the service of said writ by advertising for sale all the real estate and personal property theretofore attached * * * that all of the real estate so levied upon and advertised for sale was on the 26th day of February, 1907, sold by the United States Marshal to the said Charles D. McLure" (Tr. P. 53).

The further point is urged that the bare allegation that the marshal did not sell the Equator Lode (regard-

less of their inconsistent allegations above noted) is a sufficient allegation to raise an issue; that the absence of any affirmative showing in the marshal's return in this regard is immaterial. If this bare allegation of a conclusion which it seems to us it is for the court to reach rather than the pleader, would be sufficient, the fact remains that appellants did not merely make this allegation, but *did* set forth the fact upon which this conclusion is based, in the following language: "for the reason that the same was never levied upon or advertised for sale or *sold,* and that the complainant has never acquired any right, title or interest in and to any of said property *as will more fully appear* by the return of the said Marshal" (Tr. p. 49.)

The Marshal's return is set up by appellants, and shows nothing of the kind.

Having taken the affirmative upon this point, and pretended to set forth the foundation for their allegation that the Equator Lode was not sold by the Marshal, they now argue that the burden was not upon them to show that the exhibit they offered, which fails on its face to disclose whether or not the Equator Lode *was* included therein, does not include that property; but that the same should be explained by the adverse party. Such a rule of pleading is absurd. No reason is given why the court should indulge in any presumptions to assist appellants' pleadings. If there are to be any presumptions at all, they will certainly be in

favor of the regularity of the performance of official duty rather than that official duty has not been performed. We do not need, however, to go to any presumptions in the matter. Appellants make their allegation that the sale was not made "as will more fully appear" from an exhibit which they submit, and their exhibit does not show it.

Respectfully submitted,

IRA T. WIGHT,
CHARLES E. PEW,
Solicitors for Appellee.

No. 1117

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS, (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

MOTION FOR RE-HEARING.

....,

....,

Solicitors and of Counsel for Appellants.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE GREAT FALLS NATIONAL BANK (a Corporation), AMERICAN ENGINEERING WORKS, (a Corporation), and ED HOGAN, as Sheriff of Cascade County, State of Montana,

Appellants,

vs.

CHARLES D. McLURE,

Appellee.

MOTION FOR RE-HEARING.

Now come the appellants in the above-entitled action and move the court that a re-hearing herein be granted for the following reasons and upon the following grounds, namely:

1. Because it appears from the opinion, that the court overlooked or did not consider or refer to the return of the marshal on the execution issued on the McLure judgment. *Such return does not show that the Equator Lode claim was ever sold by the marshal under such execution, and neither his certificate of sale nor deed can include property not described in said return.*

2. Because the court overlooked the fact that while McLure in his bill of complaint in this action alleges that on the 26th day of February, 1907, the marshal "sold

said real property so levied upon * * * * and the whole thereof, to your orator," (Tr. p. 5), the appellants herein in their answer to said bill of complaint, deny this allegation and allege that the said United States marshal never at any time levied upon, advertised for sale or sold the Equator quartz lode claim, (Tr. p. 48), thus raising directly an issue of fact as to whether or not the marshal sold the Equator quartz lode claim, upon which issue of fact appellants were entitled to introduce evidence, which they were prevented from doing by the court below deciding the case upon the bill and answer without any testimony.

3. Because it appears from the opinion that the court overlooked the fact that appellants had alleged in their cross complaint that *the Equator claim was never sold under the McLure execution, and this allegation must be deemed admitted, because McLure demurred to said cross complaint.*

4. Because it appears from said opinion that the court, in effect, held, that appellants were estopped from claiming that said Equator claim was never sold under said execution, by the allegations in their former bill of complaint against McLure referred to in said opinion, in which appellants stated and alleged that the marshal had levied upon all the property of the Diamond R. Mining Company under the attachment issued in the case of McLure against the Diamond R. Mining Company. The court evidently overlooked the fact that appellants' said bill of complaint *made no allegation as to whether the Equator claim had*

been sold by the marshal under the execution issued in the case of McLure against the Diamond R. Mining Company, and overlooked the further fact that said bill of complaint was filed prior to said sale and that appellants could not therefore have made any allegations concerning the sale of said Equator claim.

5. Because it appears from the opinion that the court held that appellants were estopped to claim that the Equator lode claim was not sold under the execution in the McLure case, by the allegations of their complaint *filed at a period anterior to said sale.*

6. Because it appears from said opinion that the court held that McLure's judgment became a lien on all real estate of the Mining Company and the sale under the judgment passed the title of the judgment debtor to the purchaser, but overlooked the facts that *no title of the judgment debtor passed by the sale, except the title to such property as was actually sold under the execution.*

7. Because, admitting that appellants were estopped by their allegations in their former bill of complaint, from contending that the Equator claim had not been levied upon under McLure attachment, such estoppel could not go beyond such allegations. Since such bill of complaint had been filed prior to the sale under the McLure execution and for the express purpose of preventing such sale, *none of the allegations thereof, can be made the basis of an estoppel against appellants from contending that the marshal did not sell the Equator lode claim under the execution.*

8. Because the court overlooked the fact that whether McLure's attachment was ever levied upon the Equator lode claim and whether the appellants ever had any lien on such claim, if such claim was not sold by the marshal under the McLure execution, McLure got no title thereto; McLure's judgment lien not only having expired prior to the beginning of this suit, but his judgment having been satisfied by the execution, *if the Equator claim was not sold under the execution appellants should not have been enjoined from selling the same under their execution thereafter issued and levied.*

9. Because it appears from said opinion that the court apparently gave an erroneous effect of the marshal's certificate of sale and deed thereunder, in that the opinion recites that "the marshal's certificate of sale expressly states that it was so sold and its deed to McLure made in pursuance of the certificates of sale purports to convey among other property sold, the Equator quartz lode mining claim." *If the Equator claim was not actually sold, the certificate of sale and deed specifying the same could not be held to cover the Equator claim.*

10. Because the court in the preparation of the opinion, apparently overlooked the appellants' reply brief and arguments contained therein.

Dated February 18, 1910.

A. C. Gormley,
C. Layberg & Horsky,
Solicitors and of Counsel for Appellants.

We, the undersigned, being solicitors and of counsel for appellants in the above-entitled action, hereby certify that in our judgment the above and foregoing motion for rehearing is well founded and that the same is not interposed for delay.

Dated this 18th day of February, 1910.

A. C. Gurnley.....

Clayberg & Horsley...

Solicitors and of Counsel for Appellants.

No. 1719

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA and THE NORTHWESTERN IMPROVEMENT COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1719

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

Names and Addresses of Solicitors and Counsel of Record.

THE ATTORNEY GENERAL OF THE UNITED STATES, Washington, D. C.,
M. C. BURCH, Esq., Washington, D. C.,
FRANK HALL, Esq., Washington, D. C.,
FRED A. MAYNARD, Esq., Washington, D. C.,
JAMES W. FREEMAN, U. S. Attorney, Helena, Montana,
Messrs. WALSH & NOLAN, Helena, Montana,
Solicitors and of Counsel for Complainant and Appellee.
WM. WALLACE, Jr., Esq., JOHN G. BROWN, Esq., R. F. GAINES, Esq., of Helena, Montana,
CHARLES W. BUNN, Esq., of St. Paul, Minn.,
Solicitors and of Counsel for Defendants and Appellants.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 870—IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA, and the NORTHWESTERN IMPROVEMENT COMPANY,
Defendants.

Be it remembered, that on the 13th day of July, 1908, the complainant filed its Bill of Complaint herein, which said Bill of Complaint is in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA, and NORTHWESTERN IMPROVEMENT COMPANY,
Defendants.

Bill of Complaint.

To the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, and the Honorable, the Judges thereof:

Your orator, the United States of America, by Charles J. Bonaparte, Attorney General of the United States, brings this its bill of complaint against the Northern Pacific Railway Company, a corporation created under the laws of the State of Wisconsin, The Rocky Fork Coal Company of Montana, a corporation created under the laws of the State of Montana, and the Northwestern Improvement Company, a corporation created under the laws of the State of New Jersey, and thereupon your orator complains and says:

That the Northern Pacific Railway Company is, and since prior to the 28th day of December, 1899,

was, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

That The Rocky Fork Coal Company of Montana is, and since prior to the 28th day of December, 1899, was a corporation organized and existing under and by virtue of the laws of the State of Montana.

That the Northwestern Improvement Company is, and since prior to the 28th day of December, 1899, was, a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

That prior to the said 28th day of December, 1899, the said defendant Northern Pacific Railway Company had become, by mesne conveyances and then was the owner of all lands and rights to lands to which the Northern Pacific Railroad Company was or had become entitled to under or by virtue of any acts of the Congress of the United States, and not theretofore otherwise disposed of by the said Northern Pacific Railroad Company or the defendant Northern Pacific Railway Company, and particularly had, by mesne conveyances, become the owner of and entitled to all rights accruing to the said Northern Pacific Railroad Company, or to which it might be entitled under and by virtue of the Act of the Congress of the United States entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899.

That on and prior to the said 28th day of December, 1899, your orator was the owner, in fee simple, of certain lands, of the value of more than $100,000,

situated in the State of Montana, and within the land district of which the land office is at Bozeman, Montana, and particularly described as follows, to wit: The west half of section 13; the west half of section 24, and the southeast quarter of section 24, in township 8 south of range 20 east, Montana Principal Meridian, and the south half of section 19, in township 8 south of range 21 east, Montana Principal Meridian, and that all of said lands were, on and prior to said date, public mineral lands of the United States, and that the same contained large deposits of coal, and were chiefly valuable on account of the coal contained therein, and subject to entry and appropriation under the provisions of section 2347 of the Revised Statutes of the United States, and that the said defendants, and each of them on said date, and at the time of the filing of the lists hereinafter referred to, and of the selection of the said lands under the provisions of the Act of Congress hereinabove specifically referred to, well knew that the said lands, and each quarter section thereof, were mineral lands, and contained valuable deposits of coal and were chiefly valuable on account of the coal contained therein.

That on the 19th day of July, 1899, the said Northern Pacific Railroad Company and the said Northern Pacific Railway Company executed and delivered to the complainant their certain deed, conveying and relinquishing to the United States certain lands situated within the limits of the said Mount Rainier National Park and the Pacific Forest Reserve, referred to in the said Act of Congress,

approved March 2, 1899, including the lands within the said Pacific Forest Reserve and Mount Rainier National Park, hereinafter referred to, and thereafter, and on the 28th day of December, 1899, the said defendant Northern Pacific Railway Company filed in the said United States land office at Bozeman, Montana, an instrument in writing, wherein and whereby it selected, as therein recited, the following described lands, to wit: the west half of section 13, township 8 south of range 20 east of the Montana Principal Meridian; the west half of section 24, township 8 south of range 20 east, Montana Principal Meridian; the southeast quarter of section 24, township 8 south of range 20 east, Montana Principal Meridian, and the southwest quarter of section 19, township 8 south of range 21 east, Montana Principal Meridian, being a part of the lands hereinabove first described, in lieu of the following described tracts situated within the said Pacific Forest Reserve and Mount Rainier National Park, which it relinquished to the United States, to wit, the east half of section 1, the west half of section 1, the northeast quarter of section 3, and the southwest quarter of section 3, in township 13 north of range 10 east, which said instrument was verified by Wm. H. Phipps, Land Commissioner of the said defendant Northern Pacific Railway Company, by his affidavit as follows, to wit:

"State of Minnesota,
County of Ramsey,—ss.

I, Wm. H. Phipps being duly sworn, depose and say: that I am the Land Commissioner of the North-

ern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company; that the lands described in the foregoing list, and which are hereby selected by the Northern Pacific Railway Company, under the Act of Congress approved March 2, 1899, entitled 'An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park,' and all of them, are vacant, unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899; and that the specific lands heretofore relinquished and conveyed to the United States by said Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, in lieu of which the lands herein described are selected, are truly set forth and described in this list, and no selection has heretofore been made in lieu of any of the lands herein specified as the basis for the lands hereby selected.

WM. H. PHIPPS.

Subscribed and sworn to before me this nineteenth day of December, 1899.

[Seal] W. F. VON DEYN,

Notary Public, Ramsey County, Minnesota."

A copy of the said instrument, save for the verification thereof, which is as above set out, is hereto at-

tached, marked Exhibit "A," and by this reference made a part of this bill of complaint.

That thereafter, and on the 6th day of June, 1900, the southeast quarter of said section 19, in township 8 south of range 21 east of the Montana Principal Meridian, having continued to be and remain public mineral lands of the United States, and containing valuable deposits of coal, and being and remaining chiefly valuable for the coal contained therein, as the said defendants and each of them continued to know, the said defendant Northern Pacific Railway Company filed in the said land office at Bozeman, Montana, a further instrument in writing, wherein and whereby it selected, as therein recited, the southeast quarter of section 19, township 8 south of range 21 east, Montana Principal Meridian, being a part of the lands hereinabove first described, in lieu of the southeast quarter of section 3, township 13 north of range 10 east, which said tract is situated within the said Pacific Forest Reserve and Mount Rainier National Park, which it relinquished to the United States, which said instrument was verified by Wm. H. Phipps, Land Commissioner of the said defendant Northern Pacific Railway Company, by his affidavit as follows, to wit:

"State of Minnesota,
County of Ramsey,—ss.

I, Wm. H. Phipps being duly sworn, depose and say: that I am the Land Commissioner of the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company;

that the lands described in the foregoing list, and which are hereby selected by the Northern Pacific Railway Company, under the Act of Congress approved March 2, 1899, entitled 'An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park,' and all of them, are vacant, unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899; and that the specific lands heretofore relinquished and conveyed to the United States by said Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, in lieu of which the lands herein described are selected, are truly set forth and described in this list, and no selection has heretofore been made in lieu of any of the lands herein specified as the basis for the lands hereby selected.

WM. H. PHIPPS.

Subscribed and sworn to before me this fifth day of May, 1900.

[Seal] W. F. VON DEYN,

Notary Public, Ramsey County, Minnesota."

A copy of the said instrument, save for the verification thereof, which is as above set out, is hereto attached, marked Exhibit "B," and by this reference made a part of this bill of complaint.

That in the regular course of the business of the said United States land office at Bozeman, Montana, the said selections so made were duly approved by the Register and Receiver of the said land office, and their approval endorsed thereon, in the case of the said instrument so filed December 28, 1899, as follows:

"U. S. Land Office at Bozeman, Mont.,
Dec. 28, 1899.

"We hereby certify that we have carefully examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the Act of Congress approved March 2, 1899, entitled 'An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park,' and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum

of Twelve dollars in full payment and discharge of said fees.

A. L. LOVE,
Register.
A. J. EDSALL,
Receiver."

And in the case of the said instrument filed June 6, 1900, as follows:

"U. S. Land Office at Bozeman, Mont.
June 6, 1900.

"We hereby certify that we have carefully examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the Act of Congress approved March 2, 1899, entitled 'An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park,' and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of

Two Dollars in full payment and discharge of said fees.

A. L. LOVE,
Register.
A. J. EDSALL,
Receiver."

That the said selections having been, by the officers of the said land office at Bozeman, Montana, transmitted to and filed with the Commissioner of the General Land Office, there was, thereupon and thereafter and by reason of such selections and the verifications thereof, as hereinbefore set forth, on the 17th day of August, 1903, issued and delivered to the said defendant Northern Pacific Railway Company the patent of the United States for all of the lands hereinabove first described, a copy of which said patent is hereto attached, marked Exhibit "C," and by this reference made a part of this bill of complaint.

That for many years prior to the filing of the said selections, all of the said lands were well known to be mineral lands and to contain valuable deposits of coal and to be valuable for the coal contained therein, and that the said defendant Northern Pacific Railway Company, at and prior to the time of the filing of the said selections, knew that the said lands and all of them, and each quarter section of them, were mineral lands and contained valuable deposits of coal, and were chiefly valuable for the coal contained therein, and that the said verifications of the said selections were each false, as the said defendant Northern Pacific Railway Company well knew

at and before the time they were made, in this: that they were not non-mineral in character.

That prior to the issuance of the said patent and after the filing of the said selections, certain persons being desirous of entering portions of said lands, under and by virtue of the provisions of Sections 2347 and 2348 of the Revised Statutes of the United States, suggested to the Land Department that the said lands contained valuable deposits of coal, and thereupon asked for the cancellation of the said selections, and that the matter coming on to be heard before the Commissioner of the General Land Office and the Secretary of the Interior, it was, by the said officers, erroneously held and decided that if the said lands had been, prior to their selection by the said defendant Northern Pacific Railway Company, classified as nonmineral at the time of the actual Government survey thereof, as it was held they were, the said defendant Northern Pacific Railway Company was entitled to select the said lands and obtain a patent for the same upon its selection, notwithstanding such lands were in fact mineral lands and contained valuable deposits of coal, as the defendant Northern Pacific Railway Company knew at the time it made its selection thereof, under the said Act approved March 2, 1899; that having so erroneously held, the suggestion and application of the said persons was dismissed and patent issued to the said defendant Northern Pacific Railway Company for the said lands, as hereinbefore set forth.

That the said defendant Northern Pacific Railway Company having so obtained patent to the said

lands, on the 5th day of November, 1902 it executed and delivered to the defendant Northwestern Improvement Company its deed of conveyance of all of the said lands, except the southeast quarter of section 19, in township 8 south of range 21 east of the Montana Principal Meridian. That thereafter, on the 28th day of January, 1903, the said defendant Northwestern Improvement executed and delivered to the defendant The Rocky Fork Coal Company of Montana its deed of conveyance of all of the said lands, except the said southeast quarter of section 19, township 8 south of range 21 east; and that thereafter, on the 8th day of September, 1903, the said The Rocky Fork Coal Company of Montana executed and delivered to the said defendant Northwestern Improvement Company its deed of conveyance, wherein and whereby it re-conveyed to the Northwestern Improvement Company the said lands conveyed to it by said Northwestern Improvement Company on the 28th day of January, 1903. That thereafter, on the 29th day of February, 1904, the Northern Pacific Railway Company executed and delivered to the said Northwestern Improvement Company, its deed of conveyance, wherein and whereby it conveyed the southeast quarter of section number nineteen in township 8 south of range 21 east of the Montana Principal Meridian, containing one hundred and sixty acres.

That at all times since prior to the 5th day of November, 1902, all of the stock of both the Northwestern Improvement Company and the Rocky Fork Coal Company of Montana was held and owned by the

defendant Northern Pacific Railway Company, or by certain persons who held the same in trust for the said defendant Northern Pacific Railway Company, and that each of the said defendants Northwestern Improvement Company and The Rocky Fork Coal Company of Montana, at all times since prior to the 5th day of November, 1902, had knowledge and notice of all of the facts hereinbefore set forth, and that neither of the said defendants Northwestern Improvement Company nor the said The Rocky Fork Coal Company of Montana ever paid any consideration for the said lands, or for any of them, and that each of them, while it held the title to the said lands, held the same in trust for the defendant Northern Pacific Railway Company, and that the said Northwestern Improvement Company now holds the title to the said lands in trust for its codefendant, the Northern Pacific Railway Company.

That all of the said lands are vacant and unoccupied. That the said patent for the same was duly recorded in the office of the County Recorder of Carbon County, Montana, within which the said lands are situated, on the 11th day of September, 1903, the said conveyance from the said defendant Northern Pacific Railway Company to the defendant Northwestern Improvement Company on the 15th day of November, 1902; the said conveyance from the defendant Northwestern Improvement Company to the defendant The Rocky Fork Coal Company of Montana, on the 21st day of February, 1903; the said conveyance from the defendant The Rocky Fork Coal Company of Montana to the said defendant North-

western Improvement Company in the 12th day of September, 1903, and the said conveyance from the defendant Northern Pacific Railway Company, to the defendant Northwestern Improvement Company, dated February 29, 1904, on the 26th day of March, 1904, and that all of the said instruments constitute clouds upon the title of your orator to the said lands.

All of which acts and doings of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof, and by the strict rules of the common law and is and for as much as your orator is remediless in the premises at and by the strict rules of the common law and is relievable only in a Court of Equity, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendants, Northern Pacific Railway Company, The Rocky Fork Coal Company of Montana, and the Northwestern Improvement Company, may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer. That is to say:

1. Whether all of the capital stock of the defendant Northwestern Improvement Company is not, and

since prior to the 5th day of November, 1902, has not been owned by the defendant Northern Pacific Railway Company, and if not whether the majority of the stock of the defendant Northwestern Improvement Company is not owned by the defendant Northern Pacific Railway Company, and how much, if any of the stock of the defendant Northwestern Improvement Company is owned by the defendant Northern Pacific Railway Company.

2. Whether at a hearing before the Interstate Commerce Commission, on the 18th day of March, 1907, at Chicago, Illinois, in the case of the City of Spokane, Washington versus Northern Pacific Railway Company and others, one Thomas Cooper, then an officer of the defendant Northern Pacific Railway Company, did not submit a summary of coal properties belonging to the defendant Northern Pacific Railway Company, which he valued at over fifty million dollars, and whether he did not say, in testifying before the Interstate Commerce Commission, in the matter referred to, at the time and place mentioned, or at some other time or place, on and at the said hearing, as follows: "The coal properties referred to are located at Red Lodge and Chestnut, Montana, and at Roslyn, Clealum, Ravensdale and Melmont, Washington," and whether, in the course of such hearing, and while the said Thomas Cooper was testifying, Mr. C. W. Bunn, the general counsel of the defendant Northern Pacific Railway Company, representing it before the said Commission at the said hearing, did not say as follows: "I want to state all there is about this frankly to the Commission. These

coal lands are not literally owned by the Northern Pacific Railway Company, but they are held, as I understand it, by the Northwestern Improvement Company, which the Railway Company owns all the stock of," and whether the witness Mr. Cooper referred to did not say, in relation to the statement so made, "Yes, sir, that is the fact."

3. Whether all of the capital stock of the defendant The Rocky Fork Coal Company of Montana is not, and since prior to the 28th day of January, 1903, has not been owned by the defendant Northern Pacific Railway Company, and if not whether the majority of the stock of the defendant The Rocky Fork Coal Company of Montana is not owned by the defendant the Northern Pacific Railway Company, and how much, if any, of the stock of the defendant The Rocky Fork Coal Company of Montana is owned by the defendant Northern Pacific Railway Company.

4. Whether ever since prior to the 5th day of November, 1902, a number of the persons who appear now by the books of the Northwestern Improvement Company to be the owners of shares of its capital stock do not, in fact, hold such stock merely in trust for the Northern Pacific Railway Company, and which of the stockholders of the Northwestern Improvement Company so hold the shares of stock standing in their names on the books of the Company in trust for the Northern Pacific Railway Company, and the number of shares so held by each.

5. Whether, ever since prior to the 28th day of January 1903, a number of the persons who appear now by the books of The Rocky Fork Coal Company

of Montana to be the owners of shares of its capital stock do not, in fact, hold such stock merely in trust for the Northern Pacific Railway Company, and which of the stockholders of The Rocky Fork Coal Company of Montana so hold the shares of stock standing in their names on the books of the Company in trust for the Northern Pacific Railway Company, and the number of shares so held by each.

6. Whether, on prior to and after the 5th day of November, 1902, C. S. Mellen was not the president of the Northern Pacific Railway Company, and R. H. Relf its assistant secretary.

7. Whether on, prior to and after the 28th day of January, 1903, C. S. Mellen was not the president, and R. H. Relf, the assistant secretary of the Northwestern Improvement Company.

8. Whether, on, prior to and after the 8th day of September, 1903, C. S. Mellen was not the president, and R. H. Relf the assistant secretary of The Rocky Fork Coal Company of Montana.

9. Whether the said C. S. Mellen was not continuously president of the Northern Pacific Railway Company, the Northwestern Improvement Company and The Rocky Fork Coal Company of Montana, since prior to the 5th day of November, 1902, until after the 8th day of September, 1903, and if not, state during what portion of the said period he occupied any official position with any of the said Companies, and with which companies.

10. Whether the said R. H. Relf was not continuously assistant secretary of the Northern Pacific Railway Company, the Northwestern Improvement

Company and The Rocky Fork Coal Company of Montana since prior to the 5th day of November, 1902, until after the 29th day of February, 1904, and if not, state during what portion of the said period he occupied any official position with any of the said companies, and with which companies.

11. Whether, on or about the 5th day of November, 1902, the said C. S. Mellen, as president, and the said R. H. Relf, as assistant secretary did not execute, for and on behalf of the Northern Pacific Railway Company, a deed to the Northwestern Improvement Company, conveying to it the following described tracts, to wit:

The west half of section 13, and the west half and southeast quarter of section 24, in township 8 south of range 20 east, and the fractional southwest quarters of section 19, in township 8 south of range 21 east, Montana Principal Meridian.

12. Whether, on or about the 28th day of January, 1903, the said C. S. Mellen, as president, and the said R. H. Relf, as assistant secretary, did not execute, for and on behalf of the Northwestern Improvement Company, a deed conveying the following described lands, to wit:

The north half and the fractional southwest quarter of section 19, in township 8 south of range 21 east; all of sections 13 and 24, in township 8 south of range 20 east of the Montana Principal Meridian, to The Rocky Fork Coal Company of Montana.

13. Whether, on or about the 8th day of September, 1903, the said C. S. Mellen, as president and the said R. H. Relf, as assistant secretary, did not

execute for and on behalf of The Rocky Fork Coal Company of Montana, a deed conveying to the Northwestern Improvement Company, the lands last above described.

14. Whether, on or about the 29th day of February, 1904, one Howard Elliott, as president, and the said R. H. Relf, as assistant secretary, did not execute for and on behalf of the Northern Pacific Railway Company, a deed conveying to the Northwestern Improvement Company, the southeast quarter of section 19 in township 8, south of range 21 east, Montana Principal Meridian.

15. Whether, on and prior to the 5th day of November, 1902, the chief business or one of the important branches of business in which the Northwestern Improvement Company was engaged, was not the mining and selling of coal, and whether the said Northwestern Improvement Company was not organized for the purpose, among others, of acquiring and holding coal lands for the use and benefit of the Northern Pacific Railway Company.

16. Whether, on and prior to the 28th day of January, 1903, and continuously thereafter until on or after the 8th day of September, 1903, the principal, if not the only, business of The Rocky Fork Coal Company of Montana, was not the mining and selling of coal, and whether it was not, during that period, engaged in the operation of coal properties in the county of Carbon, State of Montana.

17. Whether, on and after the 8th day of September, 1903, and continuously thereafter, down to the present time, the principal, if not the only busi-

ness of the Northwestern Improvement Company, in the State of Montana, was not the mining and selling of coal, and whether, it has not been, during all of said time, engaged in the operation of coal properties, in the county of Carbon, State of Montana.

18. Whether, one L. S. Storrs had not, for a period of about six years prior to the year 1903, or during the years 1898, 1899 and 1900, been the geologist for the Northern Pacific Railway Company, the Northwestern Improvement Company, and The Rocky Fork Coal Company of Montana, and whether he did not, during such period, reside at Bozeman, in the State of Montana, and whether he was not engaged, during all of said time, or the greater portion of said time, in examining lands in the neighborhood of the Northern Pacific Railway Company's line in the State of Montana, with a view to ascertain the existence of coal in such lands.

19. Whether the said L. S. Storrs, as such geologist for the Northern Pacific Railway Company, or for the Northwestern Improvement Company, or for The Rocky Fork Coal Company of Montana, did not, prior to the month of December, 1899, make an examination, at the request of either the said Northern Pacific Railway Company, the Northwestern Improvement Company, or the Rocky Ford Coal Company of Montana, or otherwise, of the Bear Creek coal-fields, in Carbon County, in the State of Montana, and whether he did not have several parties of laborers tracing the coal outcrop in that field throughout its extent, and whether he did not make

a very detailed examination of all of the lands included in that field.

20. Whether the said L. S. Storrs did not examine the said field, as to its geological features, with a view to ascertain the presence therein of coal deposits of value, and whether he did not trace the approximate location of five of the coal seams in that field, and whether he did not submit to the defendant Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, a map showing the approximate location of such coal seams, together with the relative extent of such coal seams underneath the surface, substantially in conformity with the map hereto attached, marked Exhibit "D."

21. Whether the said L. S. Storrs did not have open cuts put on all the said veins in the year 1898, and whether he did not report to the Northern Pacific Railway Company, the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, having had information as to what was shown in those two certain drill holes, marked upon the map "Drill Hole No. 1" and "Drill Hole No. 2," and whether he did not report such holes as showing coal seams and geological formation substantially as shown on the map, Exhibit "D."

22. Whether the said L. S. Storrs did not make a report to the Northern Pacific Railway Company, or to the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, as to the results of his examination of the said Bear Creek coal-field, and as to whether he did not, in such re-

port, advise it that in his opinion the above described lands, to wit: All of sections 13 and 24 in township 8 south of range east, and all of section 19, in township 8 south of range 21 east, or some of them, contained valuable deposits of coal, or were of value because of the deposits of coal contained in them, and state as to which of such lands he so advised in his report.

23. Whether the defendants Northern Pacific Railway Company, Northwestern Improvement Company, and The Rocky Fork Coal Company of Montana, and each of them, has not now in its possession the report so made by the said L. S. Storrs, and if you answer that it has, attach to your answer a copy of the said report, and make it a part of the same.

24. If any one of the defendant companies shall answer that it has not in its possession such report, state where it is and what has become of it.

25. Whether it is not the fact that none of the lands above described, to wit, sections 13 and 24 in township 8 south of range 20 east, and section 19, in township 8 south of range 21 east, had, prior to or since the 28th day of December, 1899, any value whatever for any purpose except for the coal contained therein, so far as was known to the Northern Pacific Railway Company, the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, and if you answer this question to the effect that they had, state for what purpose such lands had any value, and which of them had any value for any purpose other than because of the coal

contained in them, and for what purposes such lands had any value, and what value such lands had for such purposes.

26. Whether it is not a fact that neither the Northern Pacific Railway Company, nor the Northwestern Improvement Company, nor The Rocky Fork Coal Company of Montana, ever had any use for any of the said lands except because of the coal contained therein, and if any of the said companies had any use for the said lands for any other purpose, state what such use was, and which of said lands were of use to it for any other purpose.

27. Whether the Northern Pacific Railway Company, the Northwestern Improvement Company, and The Rocky Fork Coal Company of Montana did not each acquire said lands solely on account of the coal which it knew or believed to be contained therein, and if you say that it did not, or that that was not its sole purpose in acquiring such lands, state what otner purpose it had in acquiring the lands.

28. Whether the Northern Pacific Railway Company, the Northwestern Improvement Company or The Rocky Fork Coal Company of Montana, did not furnish the money with which to make the coal entry of the west half of the east half of section 13, township 8 south of range 20 east, made in the name of the said R. H. Relf, and whether the said L. S. Storrs did not, while he was acting as geologist for the Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, open upon said tract a seam of coal, and whether the said Relf did

not shortly after making the said entry convey the same to the defendant Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, giving the date of the entry and the date of conveyance by the said Relf.

29. Whether the Northern Pacific Railway Company, the Northwestern Improvement Company or The Rocky Coal Company of Montana, did not furnish the money with which to make the coal entry of the northeast quarter of section 24, township 8, south of range 20 east, made in the name of Margaret E. Barry, and whether the said L. S. Storrs did not, while he was acting as geologist for the Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, open upon said tract a seam of coal, and whether the said Barry did not, shortly after making the said entry, convey the same to the defendant Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, giving the date of the entry and the date of conveyance by the said Barry.

30. Whether the Northern Pacific Railway Company, the Northwestern Improvement Company or The Rocky Fork Coal Company of Montana, did not furnish the money with which to make the coal entry of the northwest quarter of section 19, township 8 south of range 21 east, made in the name of Merton Herrick, and whether the said L. S. Storrs did not, while he was acting as geologist for the North-

ern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, open upon said tract a seam of coal, and whether the said Herrick did not, shortly after making the said entry, convey the same to the defendant Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, giving the date of the entry and the date of conveyance by the said Herrick.

31. Whether the Northern Pacific Railway Company, the Northwestern Improvement Company or The Rocky Fork Coal Company of Montana, did not furnish the money with which to make the coal entry of the northeast quarter of section 19, township 8 south of range 21 east, made in the name of Harriet B. Van Bergen, and whether the said L. S. Storrs did not, while he was acting as geologist for the Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, open upon said tract a seam of coal, and whether the said Van Bergen did not, shortly after making the said entry, convey the same to the defendant Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, giving the date of the entry and the date of conveyance by the said Van Bergen.

32. Whether the Northern Pacific Railway Company, the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, did not

furnish the money with which to make the coal entry of the east half of the east half of section 13, township 8 south of range 20 east, made in the name of Earl L. Marvin, and whether the said L. S. Storrs did not, while he was acting as geologist for the Northern Pacific Railway Company or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, open upon said tract a seam of coal, and whether the said Marvin did not, shortly after making the said entry, convey the same to the defendant Northern Pacific Railway Company, or the Northwestern Improvement Company, or The Rocky Fork Coal Company of Montana, giving the date of the entry and the date of conveyance by the said Marvin.

33. Whether such conveyances from the said entrymen Relf, Barry, Herrick, Van Bergen and Marvin, were not taken with knowledge that the said lands contained valuable deposits of coal, and whether the Northern Pacific Railway Company, the Northwestern Improvement Company and The Rocky Ford Coal Company of Montana did not, at the time that such conveyances were made, have information that said lands were valuable on account of the coal contained in them, and whether the same sources of information concerning the existence of coal within the lands so conveyed did not furnish information of like character respecting the lands in the bill of complaint described, and whether a source of the information was not, among others, the report of the said L. S. Storrs above referred to.

34. Whether the defendant Northern Pacific Railway Company had not information from the report

of said L. S. Storrs or otherwise, prior to the 28th day of December, 1899, that the coal seams which were exposed underneath and by openings north and east of the lands described in the bill of complaint, did not extend through and under the said lands and as far as a limestone reef west and south of the same.

35. Whether it is not a fact that no money or other consideration was actually paid in consideration of any of the transfers mentioned in these interrogatories, and if this interrogatory is answered in the negative, state what consideration was paid on account of each separate transfer referred to in these interrogatories, and how and when it was paid.

(The defendant Northern Pacific Railway Company is required to answer Interrogatories Nos. 1, 2, 3, 4, 5, 6, 9, 10, 11, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

The defendant Northwestern Improvement Company is required to answer Interrogatories Nos. 1, 2, 4, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 35.

The defendant The Rocky Fork Coal Company of Montana is required to answer Interrogatories Nos. 3, 5, 8, 9, 10, 12, 13, 16, 18, 19, 20, 21, 22, 23; 24; 25, 26, 27, 28, 29, 30, 31, 32, 33 and 35.)

And that it be by the Court ordered, adjudged and decreed that the said patent so issued by the United States of America to the Northern Pacific Railway Company, dated August 17, 1903, be adjudged to be null and void, and that the said defendant Northern Pacific Railway Company be ordered to deliver the same up to be canceled and that it be, by the Court,

adjudged and decreed that none of the defendants have any right, title or interest in or to the said lands in the bill of complaint hereinabove described, nor to any part thereof, and that the said defendants, and each of them, be forever enjoined and restrained from setting up or asserting any title to the said lands or any part thereof, and that the title of your orator to the same be quieted, and that it recover its costs herein, and have such other and further relief in the premises as may be equitable.

May it please your Honors to grant unto your orator a writ of subpoena of the United States of America, directed to the said Northern Pacific Railway Company, The Rocky Fork Coal Company of Montana and the Northwestern Improvement Company, commanding them, and each of them, on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

CHARLES J. BONAPARTE,
Attorney General of the United States,
JAS. W. FREEMAN,
United States District Attorney for the District of Montana,
Solicitors for Complainant.
M. C. BURCH,
FRANK HALL,
FRED. A. MAYNARD,
WALSH & NOLAN,
Counsel for Complainant.

United States of America,
District of Montana,
County of Lewis and Clark,—ss.

James W. Freeman, being duly sworn, deposes and says: That he is the United States District Attorney for the District of Montana, and one of the solicitors for the complainant in the above-entitled action; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JAMES W. FREEMAN,

Subscribed and sworn to before me this 11th day of July, 1908.

[Notarial Seal] J. PARKER VEAZEY, Jr.,
Notary Public in and for the County of Lewis and Clark, State of Montana.

Exhibit "A" [to Bill of Complaint].

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY,
List No. 89.

———— of ————,
U. S. Land Office at Bozeman, Mont.,
Dec. 28, 1899.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successors in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899,

conveying and relinquishing to the United States certain lands situated within the limits of the Mount Rainier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Bozeman land district, in the state of Montana.

LIST OF LANDS South of base line and East of Montana principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of

lands set opposite thereto, relinquished under said act of March 2, 1899.

Part of Section.		Sec.	Town S	Range E	Area Acres 100ths.	Remarks.
1	W½	13	8	20	320.00	In lieu of
2	W½	24	8	20	320.00	In lieu of
3	SE¼	24	8	20	160.00	In lieu of
4	SW¼	19	8	21	150.54	In lieu of
	Total				950.54	

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

Those certain tracts of land which when surveyed will be described as follows:

Part of Section.		Sec.	Town N	Range E	Area Acres 100ths.	Remarks.
1	E½	1	13	10	320	
2	W½	1	13	10	320	
3	NE¼	3	13	10	160	
4	SW¼	3	13	10	160	
	Total				960	

U. S. Land Office at Bozeman, Mont.,
Dec. 28, 1899.

We hereby certify that we have carefully examined the foregoing selection list filed by the North-

ern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the Act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of Twelve Dollars in full payment, and discharge of said fees.

A. L. LOVE,
Register.
A. J. EDSALL,
Receiver.

Exhibit "B" [to Bill of Complaint].

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY.
List No. 91.
State of Montana,
U. S. Land Office at Bozeman.
May, 1900.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899, conveying and relinquishing to the United States certain lands situated within the limits of the Mount Rainier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company, by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite

the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Bozeman, Mont., land district, in the State of Montana.

LIST OF LANDS South of base line and East of Montana principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899.

Part of Section.	Sec.	Town	Range	Area Acres	100ths.	Remarks.
SE¼	19	8 S	21 E	160		

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public Park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

Part of Section.	Sec.	Town	Range	Area Acres 100ths.	Remarks.
That certain tract of land which, when reserved, will be described as follows:					
SE¼	3	13 N	10 E	160	Mt. Rainier Reserve

U. S. Land Office at Bozeman, Mont.
June 6, 1900.

We hereby certify that we have carefully examined the foregoing list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the Act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum

of Two dollars in full payment and discharge of said fees.

A. L. LOVE,
Register.
A. J. EDSALL,
Receiver.

[Exhibit "C" [to Bill of Complaint].

Patent No. 96½.

UNITED STATES
To
NORTHERN PACIFIC RAILWAY COMPANY.

The United States of America, To all to whom these presents shall come, GREETING:

WHEREAS, by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and the Joint Resolution of May 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch to the Pacific Coast, "every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not re-

served, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroad is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and

WHEREAS, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and branch excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890, have been construed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted by the President; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat. 993) authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States, the land within Mount Rainier National Park, and Pacific Forest Reserve theretofore granted to said Company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified, as non-mineral at the time of the actual Government survey thereof, lying within any state into or through which the railroad of said company runs; and it is provided that patent shall issue to said company for lands so selected; and

WHEREAS, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve and the limits of the grant to the said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

WHEREAS, there has been filed in the office of the Secretary of the Interior, evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the Act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as bases therefor, are within the primary limits of the company's grant and lie opposite the constructed line of its road, and are also within the limits of the reserves released to the United States as aforesaid, to wit:

South of base line and east of Montana Meridian, State of Montana, township eight, range twenty.

The west half of section thirteen, containing three hundred and twenty acres, the southeast quarter and the west half of section twenty-four containing four hundred and eighty acres.

Township Eight, Range Twenty-one.

The south half of section nineteen containing three hundred and ten acres and fifty-four hundredths of an acre.

The said tracts of land as described in the foregoing make the aggregate area of one thousand one hundred and ten acres and fifty-four hundredths of an acre (1110.54.)

Now Know Ye, That the United States of America, in consideration of the premises and pursuant to the said acts of Congress have given and granted and by these presents do give and grant unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid, and embraced in the foregoing yet excluding and excepting "All Mineral Lands," so classified at the date of the Government survey thereof, should any such be found in the tracts aforesaid.

To Have and To Hold, the said tracts with the appurtenances thereof, unto the said Northern Pacific Railway Company, its successors and assigns forever.

In Testimony Whereof I, Theodore Roosevelt, President of the United States of America have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this the seventeenth day of August, in the year of our Lord, one thousand nine hundred and three, and

of the Independence of the United States the one hundred and twenty-eighth.

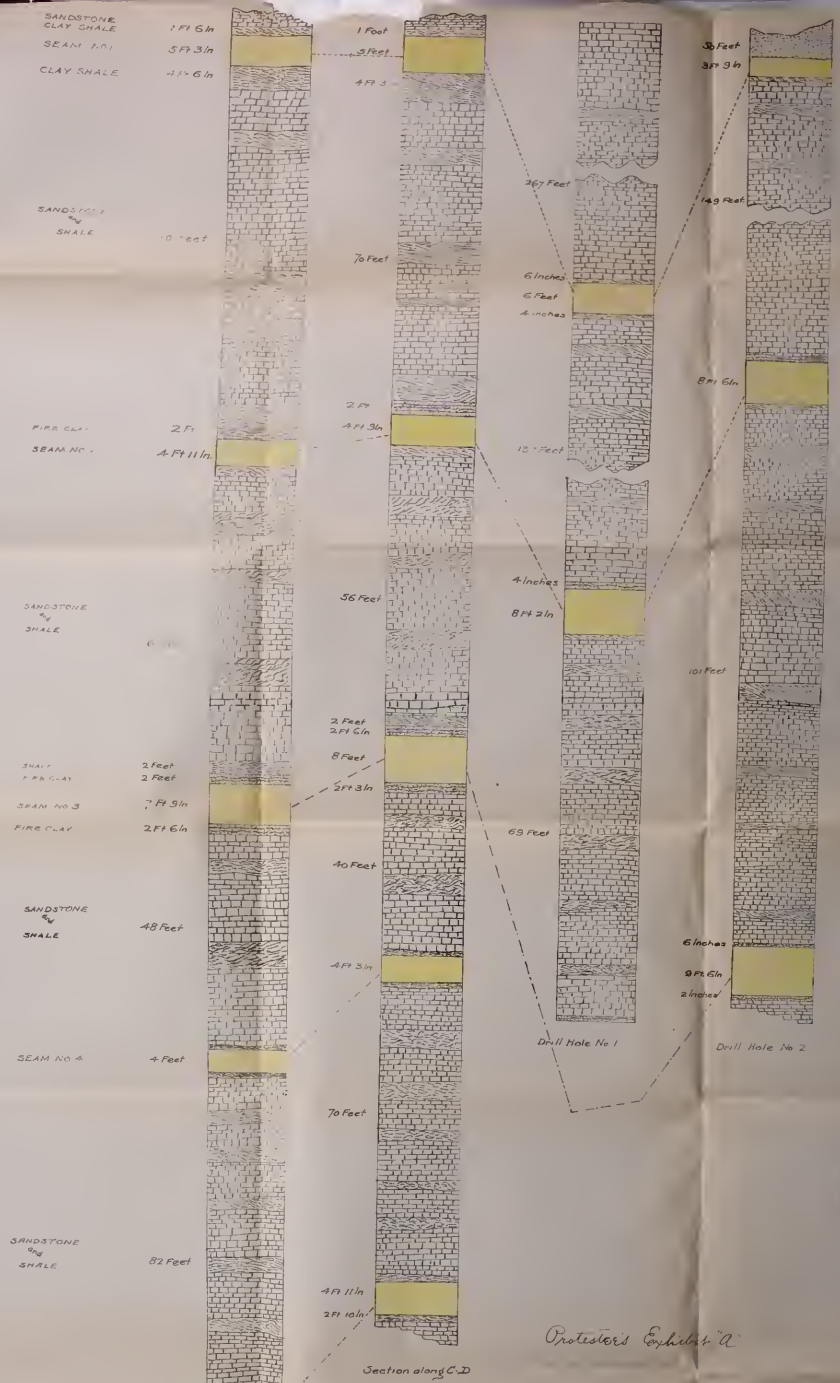
By the President: T. ROOSEVELT,
F. M. McKEAN,
Secretary.

[Seal] C. H. BRUSH,
Recorder of the General Land Office.

Recorded in Vol. 32, pages 186 to 189, inclusive.

(Here follows Exhibit "D"—a plat.)

[Endorsed]: Title of Court and Cause. Bill of Complaint. Filed July 13, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.


SANDSTONE
CLAY SHALE
1 Ft 6 In
SEAM No 1
5 Ft 3 In
CLAY SHALE
41 Ft 6 In
SANDSTONE and SHALE
10 Feet
FIRE CLAY
2 Ft
SEAM No 2
4 Ft 11 In
SANDSTONE and SHALE
6 Feet
SHALE
2 Feet
FIRE CLAY
2 Feet
SEAM No 3
7 Ft 9 In
FIRE CLAY
2 Ft 6 In
SANDSTONE and SHALE
48 Feet
SEAM No 4
4 Feet
SANDSTONE and SHALE
82 Feet
SEAM No 5
SHALE
5 Feet
2 Ft 9 In
Section along A-B
1 Foot
3 Feet
4 Ft 3
70 Feet
2 Ft
4 Ft 3 In
56 Feet
2 Feet
2 Ft 6 In
8 Feet
2 Ft 3 In
40 Feet
4 Ft 3 In
70 Feet
4 Ft 11 In
2 Ft 10 In
Section along C-D
267 Feet
6 Inches
6 Feet
4 Inches
12 Feet
4 Inches
8 Ft 2 In
69 Feet
Drill Hole No 1
35 Feet
3 Ft 9 In
149 Feet
8 Ft 6 In
101 Feet
6 Inches
9 Ft 6 In
2 Inches
Drill Hole No 2
Protesters Exhibit "A"
Exhibit "D"
R 20 E
R 21 E
35
36
31
32
T 7 S
2
1
6
5
11
12
7
8
T 8 S
DRILL HOLE No 1
DRILL HOLE No 2
LOADING CUT
SEAM No 1
SEAM No 2
SEAM No 3
SEAM No 4
SEAM No 5
A
B
C

And thereafter, to wit, on the 13th day of July, 1908, a Subpoena in Equity was duly issued herein, in the words and figures following, to wit:

[Subpoena.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To Northern Pacific Railway Company, The Rocky Fork Coal Company of Montana and Northwestern Improvement Company, Defendants.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, Montana, on the 3d day of August, A. D. 1908, to answer a Bill of Complaint exhibited against you in said court by the United States of America, complainant, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 13th day of July, in the year of our Lord, one thousand nine hundred and eight, and of our Independence the 133d.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of August next, at the Clerk's Office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

CHAS. J. BONAPARTE,
Attorney General of the United States,
Washington, D. C., and
JAS. W. FREEMAN,
U. S. Atty., Helena, Montana, Solicitors for Complainant.

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 13th day of July, 1908, and personally served the same on the 13th day of July, 1908, by delivering to, and leaving with William Wallace, Jr., the Statutory Agent for each said company defendant Northern Pacific Railway Company and the Northwestern Improvement Company, said defendants named therein personally, at Helena, in the County of Lewis and Clark in said District, a copy thereof, that I was

unable to find defendant, The Rocky Fork Coal Company in the District of Montana.

Helena, July 13th, 1908.

ARTHUR W. MERRIFIELD,
U. S. Marshal.
By Scott N. Sanford,
Deputy.

[Endorsed]: No. 870. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. United States of America vs. Northern Pacific Ry. Co. et al. Subpoena. Filed July 14th, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Reputy Clerk.

And thereafter, to wit, on the 1st day of September, 1908, defendants filed their answer herein, which said answer is in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA, and NORTHWESTERN IMPROVEMENT COMPANY,
Defendants.

Answer.

Joint and several answer of the Northern Pacific Railway Company, Rocky Fork Coal Company of

Montana and Northwestern Improvement Company, defendants, to the Bill of Complaint of the United States.

These defendants, reserving all right of exception to said bill of complaint, for answer thereunto say:

It is true as alleged in the bill that these defendants are and have for many years been corporations as stated; that prior to the 28th day of December, 1899, the defendant Northern Pacific Railway Company has become by mesne conveyances and then was the owner of all the lands and rights of lands which the Northern Pacific Railroad Company was or had become entitled to under and by virtue of any acts of the Congress of the United States and not theretofore otherwise disposed of by the said Northern Pacific Railroad Company or the defendant railway company, and particularly as alleged in the bill, had become the owner of and entitled to all rights accruing to said Northern Pacific Railroad Company and to which it might be entitled under and by virtue of the act of Congress, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899.

It is true that prior to the 28th day of December, 1899, the United States was the owner in fee simple of certain lands, which were of considerable value, but which to the best of these defendants' knowledge and belief were worth much less than $100,000 and not exceeding the sum of $28,000, situated in the State of Montana and in the land district of which

the land office is at Bozeman, Montana, and which are described in the bill.

It is true that all of said lands were on or prior to the said date public mineral lands of the United States, and that the same contained large deposits of coal and were chiefly valuable on account of the coal therein contained, and were subject to entry and appropriation under the provisions of Section 2347 of the Revised Statutes, and that the said defendants and each of them on that date and at the time of the filing of the lists of selection referred to in the bill well knew that the said lands, and each quarter section thereof, were mineral lands and contained valuable deposits of coal, and were chiefly valuable on account of the coal contained therein.

It is true that on the 19th day of July, 1899, the said Northern Pacific Railroad Company and the defendant Northern Pacific Railway Company executed and delivered to the United States their certain deed, conveying and relinquishng to the United States certain lands situated within the limits of the Mount Rainier National Park or Forest Reserve, as alleged in the bill, and that on the 28th day of December, 1899, the Northern Pacific Railway Company filed in the United States Land Office at Bozeman, Montana, an instrument in writing whereby it selected the lands described in the bill, and that said instrument was verified by William H. Phipps, who was Land Commissioner of the defendant Northern Pacific Railway Company, and his affidavit is correctly set forth in the bill.

It is true that thereafter on the 6th day of June, 1900, the southeast quarter of section nineteen (19) in township eight (8) south, of range twenty-one (21) east of the Montana Principal Meridian, having continued to be and remain public mineral lands of the United States and containing valuable deposits of coal and being chiefly valuable for the coal contained therein, as each of these defendants then well knew, the defendant Northern Pacific Railway Company, filed in the said land office at Bozeman, a further instrument in writing whereby it selected the said lands, as stated in the bill, and said instrument was verified by William H. Phipps, who was Land Commissioner of the defendant, Northern Pacific Railway Company, in the form set forth in the bill.

It is true that in the regular course of business of the United States land office at Bozeman, said selections were all duly approved by the Register and Receiver of said land office, and their approval was endorsed thereon in the manner and form set forth in the bill.

It is true that said selections, having been so approved, were transmitted to and filed with the Commissioner of the General Land Office, and that there was thereupon and thereafter and by reason of such selections and verification thereof, as stated, a patent issued and delivered to the said Northern Pacific Railway Company for all the lands described in the bill, a copy of which patent is therein correctly set forth.

It is true that for many years prior to the filing of said selections all of said lands were known to be mineral and to contain valuable deposits of coal and to be valuable for the coal contained therein, and that the said Northern Pacific Railway Company at and prior to the time of filing its said selections knew that the said lands, and all of them, and each quarter section thereof, were mineral lands and contained valuable deposits of coal, and were chiefly valuable for the coal contained therein; but these defendants deny that the verifications of said selections were false, as alleged in the bill, and, on the contrary, allege and submit that the said verifications were true.

It is true that prior to the issuance of the said patent and after the filing of the said selections certain persons, being desirous of entering portions of said lands under and by virtue of the provisions of sections 2347 and 2348 of the Revised Statutes, suggested to the Land Department that the said lands contained valuable deposits of coal, and thereupon asked for the cancellation of the said selections, and that, the matter coming on to be heard before the Commissioner of the General Land Office and the Secretary of the Interior, it was by the said officers held and decided that the said lands had been prior to their said selection classified as non-mineral, and it was therefore held by said officers that the defendant railway company was entitled to select the said lands and obtain patent for the same upon its selection notwithstanding that said lands were in fact mineral, as aforesaid. But these defendants deny that said decision was erroneous. They say that said

decision was according to the settled ruling of the Commissioner of the General Land Office and the Secretary of the Interior and not peculiar in any way to the selections in question; that said officers in the construction and application of the said laws of Congress ruled that sections 3 and 4 of the Act of Congress of March 2, 1899 (10 Stat. 993) authorized the selection by the said railway company of any lands, whether mineral or not in fact, which had been classified as non-mineral at the time of the actual government survey. These defendants say that the lands described in the bill of complaint, and each and every subdivision thereof, had been returned and classified as non-mineral by and at the time of the actual government survey, and insist that by reason of such fact they were subject to the defendant railway company's selection, and being free from other claims and rights, were properly selected and validly patented to said defendant.

These defendants say that far from the affidavits of the said William H. Phipps being in any respect false, they were perfectly true in every particular; that the fact of the lands containing coal and the fact that the defendant railway company knew them to contain coal and sought to select them because of their containing coal, was perfectly well known to the Commissioner of the General Land Office and the Secretary of the Interior at the time and at all times subsequent to the said selections. The character and value of the said lands was in no manner misrepresented to the Land Department of the United States

nor concealed in any manner from that department by the defendant railway company.

It is true that the defendant railway company, having so obtained patent to the said lands, on the 5th day of November, 1902, executed and delivered to the defendant Northwestern Improvement Company its deed of conveyance thereof, except the southeast quarter of section nineteen (19) in township eight (8) south, of range twenty-one (21) east of the Montana Principal Meridian, and that thereafter on the 28th day of January, 1903, the defendant Northwestern Improvement Company, executed and delivered to the defendant, The Rocky Fork Coal Company of Montana, its deed of conveyance of the same lands; also that thereafter on the 8th day of September, 1903, The Rocky Fork Coal Company of Montana, executed and delivered to the defendant, Northwestern Improvement Company, its deed of conveyance whereby it re-conveyed to the said Improvement Company the said lands so conveyed to it, and that on the 29th day of February, 1904, the Northern Pacific Railway Company executed and delivered to the said improvement company its deed of conveyance, conveying the southeast quarter of section nineteen (19), as alleged in the bill.

It is true that at all times since prior to the 5th day of November, 1902, all of the stock of the Northwestern Improvement Company was held and owned by the defendant Northern Pacific Railway Company, except a few shares which were held by directors in trust for the said railway company, and that the defendant, Northwestern Improvement Com-

pany, at all times since prior to the 5th day of November, 1902, had knowledge and notice of all facts hereinbefore admitted to be true. While it is not true that the said defendant, Northwestern Improvement Company, paid no consideration for the said lands, it is true that this corporation was owned wholly by, acted exclusively in the interest of, and was wholly controlled by the Northern Pacific Railway Company, and that the said lands are now held by the Northwestern Improvement Company and are indirectly owned by the said defendant railway company through its ownership of all the stock of the improvement company.

As to the Rocky Fork Coal Company of Montana, it has been since prior to the 5th day of November, 1902, a corporation having 20,000 shares of outstanding stock. Since the first day of September, 1902, the Northwestern Improvement Company has owned 19,497½ shares of that stock. On said first day of September, forty-one shares of this stock stood in the names of directors and officers who held the same for the said Improvement Company. The remainder of the stock was then owned by the public and was in no way owned, controlled or held by or in the interest of either the said improvement company or the Northern Pacific Railway Company, the following individuals appearing on the books of said corporation to own the amount of stock below stated:

	Shares.
Sophronia S. Bradley	4
James B. Colgate	200
W. H. Day	55

Edward N. Gibbs	10
J. B. Glover	125
D. B. Henderson	5
W. H. Knowlton	5
J. V. Rider	30
Jennie R. and H. Burton Strait	1
Jennie R. Strait	8
H. Burton Strait	16
G. Ulbricht	1
J. L. Platt	1½

The stock of this company was held in the manner, and by the persons, above stated until after the 5th day of November, 1902. The said stock held as before stated by the public was subsequently purchased by the Northwestern Improvement Company (except the 1½ shares owned by J. L. Platt, which have never been purchased by the improvement company or in its behalf), and was purchased at various dates between the 17th day of December, 1902, and the fifth day of June, 1903, each purchase being made for a valuable consideraton.

The Northwestern Improvement Company paid to the Northern Pacific Railway Company for the lands described in the aforesaid deed, dated the 5th day of November, 1902, the sum of $23,763.50, which was $25 per acre for the land conveyed by the said deed. The Rocky Fork Coal Company of Montana paid to the Northwestern Improvement Company for the said land $33.57 per acre. The Northwestern Improvement Company paid the Northern Pacific Railway Company for the land described in the aforesaid deed, dated the 29th day of February,

1904, the sum of $4,000, being at the rate of $25 per acre for the land conveyed by the deed. Whilst the Northwestern Improvement Company paid to the Rocky Fork Coal Company a large and valuable consideration for the lands described in the aforesaid conveyance from the Rocky Fork Coal Company to the Northwestern Improvement Company, dated the 8th day of September, 1903, it is impossible to state what such consideration was as the purchase included all the property of whatsoever kind of the Rocky Fork Coal Company, which included many other lands and other properties. The total cost to the Northwestern Improvement Company for the whole of the property of the Rocky Fork Coal Company was $841,192.91, which the parties did not divide or apportion to different parts of the property.

It is true that said lands are vacant and unoccupied, and that the various conveyances thereof referred to in the bill were recorded as therein stated.

And these defendants, having answered everything in the bill material to the relief prayed by the plaintiff, submit that no further answer is ma-

terial or necessary and humbly pray to be hence dismissed with reasonable costs and charges.

NORTHERN PACIFIC RAILWAY COMPANY,
By HOWARD ELLIOTT,
President.

[Corporate Seal] Attest: R. H. RELF,
Assistant Secretary.

THE ROCKY FORK COAL COMPANY OF MONTANA,

[Corporate Seal] By R. H. RELF,
Assistant Secretary.

NORTHWESTERN IMPROVEMENT COMPANY,
By HOWARD ELLIOTT,
President.

[Corporate Seal] Attest: R. H. RELF,
Assistant Secretary.

J. G. BROWN,
R. F. GAINES and
WM. WALLACE, Jr.,
Solicitors for all the Defendants.
CHARLES W. BUNN,
Of Counsel.

State of Minnesota,
County of Ramsey,—ss.

Thomas Cooper, being first duly sworn, deposes and says: I am Land Commissioner of the Northern Pacific Railway Company and have been such since April 1, 1904. I am Land Commissioner of the Northwestern Improvement Company and have been such since April 1, 1904. The foregoing joint and

several answer of the Northern Pacific Railway Company, Northwestern Improvement Company and the Rocky Fork Coal Company of Montana, is true to the best of my knowledge, information and belief.

As to all matters referred to in the answer occurring since I became Land Commissioner, as before stated, they are true of my own knowledge.

As to those matters occurring before that time, they are true to the best of my information and belief. The source of my information and the grounds of my belief as to such matters are the contents of the books and records of the defendant corporations and the communications made to me from time to time by the officers thereof and by other individuals.

THOMAS COOPER.

Subscribed and sworn to before me this 27th day of August, 1908.

[Notarial Seal] W. T. VON DEYN,
Notary Public, Ramsey County, Minn.

My Commission expires May 11, 1913.

Due service and receipt of copy of within Answer admitted as made at Helena, Montana, September 1, 1908.

JAMES W. FREEMAN,
U. S. District Atty.
And WALSH & NOLAN,
Solicitors for Complainant.

[Endorsed]: Title of Court and Cause. Answer. Filed Sept. 1, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of April, 1909, a Decree was duly rendered and entered herein, which said Decree is in the words and figures following, to wit:

[Decree.]

The Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN PACIFIC RAILWAY CO., ROCKY FORK COAL CO. OF MONTANA, and NORTHWESTERN IMPROVEMENT CO.,
Defendants.

The above-entitled cause coming on to be heard before the Court on the bill and answer, the complainant appeared by their counsel, T. J. Walsh, Esq., and the defendants by Wm. Wallace, Jr., their solicitor and counsel; and the Court having listened to the arguments of the counsel for the parties respectively, and having taken the cause under advisement, and having on the third day of April, 1909, rendered and filed its opinion in favor of the complainant and against the said defendants, and now being fully advised,

It is, by the Court, on this 8th day of April, 1909, ordered, adjudged and decreed, that that certain patent issued by the United States of America to the

Northern Pacific Railway Co., bearing date the 17th day of August, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth, wherein and whereby there was granted in terms by the United States of America to the Northern Pacific Railway Company, the following-described lands, situated in the county of Carbon, State of Montana, to wit:

The west half (W. ½) of section thirteen (13), township eight (8) south of range twenty (20) east of the Montana Principal Meridian; the west half (W. ½) of section twenty-four (24), township eight (8) south of range twenty (20) east of the Montana Principal Meridian; the southeast quarter (SE. ¼) of section twenty-four (24), township eight (8) south of range twenty (20) east of the Montana Principal Meridian and the southwest quarter (SW. ¼) of section nineteen (19) township eight (8) south of range twenty-one (21) east of the Montana Principal Meridian; the southeast quarter (SE. ¼) of section nineteen (19), township eight (8) south of range twenty-one (21) east of the Montana Principal Meridian, is, and at all times since its issuance, has been null and void, and the said defendants are hereby commanded to deliver the same up to the clerk of this court to be canceled, and it is hereby ordered and directed that when the same is so surrendered up to the said clerk, he shall mark the same as canceled, pursuant to this decree.

And it is further adjudged and decreed that the said lands are, and at all times have been, the prop-

erty of the said complainant, the United States of America, and the title to the same is hereby in it quieted; and the said defendants and each of them are hereby adjudged to have no right or title to the said lands, or to any portion of the same; and they and each of them are hereby commanded absolutely to desist and refrain from making or asserting any claim of right in or to the same, or to any part thereof.

And it is further adjudged that the complainant, the United States of America, recover of the defendants, its costs herein to be taxed by the Clerk.

The patent hereinabove referred to is in words and figures as follows, to wit:

Patent No. 96½.

UNITED STATES

To

NORTHERN PACIFIC RAILWAY COMPANY.

The United States of America, To all to Whom These Presents shall Come, Greeting:

WHEREAS, by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and the Joint Resolution of May 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific Coast, "every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections

per mile on each side of said railroad line, as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroad is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and

WHEREAS, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first-named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890, have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted by the President; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat. 993), authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States, the land within Mount Rainier National Park, and Pacific Forest Reserve theretofore granted to said company, whether surveyed or unsurveyed, and to select in

lieu thereof an equal quantity of non-mineral public lands, so classified, as non-mineral at the time of the actual Government survey thereof, lying within any state or through which the railroad of said company runs; and it is provided that patent shall issue to said company for lands so selected; and

WHEREAS, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve and the limits of the grant to the said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

WHEREAS, there has been filed in the office of the Secretary of the Interior, evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the Act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following-described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as bases therefor, are within the primary limits of the company's grant and lie opposite the constructed line of its road, and are also within the limits of the reserves released to the United States as aforesaid, to wit:

South of base line and east of Montana Meridian, State of Montana, township eight, range twenty.

The west half of section thirteen, containing three hundred and twenty acres, the southeast quarter and the west half of section twenty-four, containing four hundred and eighty acres.

Township Eight, Range Twenty-one.

The south half of section nineteen containing three hundred and ten acres and fifty-four hundredths of an acre.

The said tracts of land as described in the foregoing make the aggregate area of one thousand one hundred and ten acres and fifty-four hundredths of an acre (1110.54).

Now Know Ye, That the United States of America, in consideration of the premises and pursuant to the said Acts of Congress have given and granted and by these presents do give and grant unto the said Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid, and embraced in the foregoing yet excluding and excepting "All Mineral Lands," so classified at the date of the Government survey thereof, should any such be found in the tracts aforesaid.

To Have and To Hold, the said tracts with the appurtenances thereof, unto the said Northern Pacific Railway Company, its successors and assigns forever.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this the seventeenth day of August, in the year of our Lord, one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth.

By the President: T. ROOSEVELT,

[Seal] F. M. McKEAN,
Secretary.

C. H. BRUSH,
Recorder of the General Land Office.

Done in open court, this 8th day of April, 1909.

By the Court.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and Entered April 8, 1909. Geo. W. Sproule, Clerk.

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this Court.

Witness my hand and the seal of said Court at Helena, Montana, this 8th day of April, A. D. 1909.

[Seal] GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy Clerk.

[Endorsed]: Title of Court and Cause. Final Record. Filed and Entered April 8, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

That on the 3d day of April, 1909, the Memorandum Opinion of the Court was duly rendered and filed herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA, and NORTHWESTERN IMPROVEMENT COMPANY,

Defendants.

Memorandum Opinion.

This is a suit brought by the United States against defendants to have a certain patent for coal lands in Montana, issued to the Northern Pacific Railway Company, adjudged null and void. The lands were selected in December, 1899, by the defendant, Northern Pacific Railway Company, in lieu of certain lands conveyed by it to the United States, under the provisions of the act of Congress of March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park." Section one of the act sets apart the particular lands which Congress desired to include within a park for the bene-

fit and enjoyment of the people. Section two places the park under the exclusive control of tthe Secretary of the Interior, and authorized him to make regulations for the management of the park, and the construction of roads therein, and to make provision against the destruction of fish and game. Section three reads as follows:

"That upon execution and filing with the Secretary of the Interior by the Northern Pacific Railroad Company of proper deed releasing and conveying to the United States the land in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States. * * *"

Section four of the act provides that upon the filing by the railroad at the local land office of the land district in which any tract of land has been selected, and the payment of fees, and after the approval of the Secretary of the Interior, patents of the United States conveying to the railroad company the lands

so selected shall be issued. In case the tract so selected shall be at the time of the selection unsurveyed, the list filed by the railroad company at the local land office shall describe the tract so as to designate it with reasonable certainty; and within three months after the lands including such tract shall have been surveyed and the plats filed by the local land office, a new selection list shall be filed by the company describing the tract according to the survey. Section five provides that the mineral land laws of the United States are extended to the lands lying within the reserve and park.

The cause was heard on bill and answer. The facts are that the lands in controversy were surveyed several years before the selection, and were classified as nonmineral at the time of actual government survey. The fact that they contained coal deposits of more or less value was known to the railway company at the time of selection. On August 17, 1903, patent to the lands was issued to the Northern Pacific, which thereafter conveyed certain parcels thereof to the defendants, Rocky Fork Coal Company of Montana, and Northwestern Improvement Company, neither of which defendants acquired any higher rights to the lands in question than the Northern Pacific Railway acquired.

The question presented involves the proper construction of section three of the statute referred to.

If counsel for the government are correct, we must read the law as if it contained the copulative "and," so as to make the authority of the railroad company one "to select an equal quantity of nonmineral pub-

lic lands and so classified as nonmineral at the time of actual government survey," etc.; while if the contention of counsel for the defendants is acceptable, then the words "nonmineral public lands, so classified as nonmineral at the time of actual government survey," etc., indicate definitely what lands were available to the railway company in lieu of those relinquished, and were used by Congress to give certainty and security to the selections made, by definitely fixing what lands could be selected, irrespective of the actual character of the land. The Department of the Interior, upon presentation of the question involved, decided that the railroad company was entitled to select the lands in controversy, and accordingly, in August, 1903, patent was issued.

Davenport v. Northern Pacific Railway Co., 32 L. D. 28.

To adopt the construction asked for by the Government is not wholly satisfactory, in that it calls for the practical insertion of the conjunctive into the text, while to adopt the defendants' view seems un sound because it ignores the full significance of the words "nonmineral public lands," as found in the first sentence, giving to the railroad company general authority to select.

We must, therefore, regard the case as one where the letter of the law has failed to convey a clear meaning; hence, we are at liberty to turn to some general rules which will aid in solving the doubtfulness. By doing this, we may ascertain some points of superior strength, upon which the judgment of the

Court should rest, subject to review by the learned Judges of higher tribunals.

It is proper to consider that the general policy of Congress has been to reserve mineral lands from grants made of public lands; and that coal lands are mineral within the meaning of that term, as generally employed in the laws regulating disposal of the public domain, has also been decided.

Mullan v. United States, 118 U. S. 271.

Northern Pacific Railway v. Soderberg, 188 U. S. 526.

The special express provisions made in certain acts of Congress, of which the original act making grant to the Northern Pacific Railroad was one, to aid in the construction of railways, to the effect that coal and iron lands shall not be deemed mineral within the provisions of such acts, emphasize the point that such lands would be included as mineral, unless specially excluded.

Barden v. Northern Pacific Railroad, 154 U. S. 288.

Undoubtedly, the lands to be taken under the act in question are such as the definitions of Congress and the decisions of the Supreme Court have attached to the word "mineral" since 1864.

Northern Pacific Railway Company v. Soderberg, supra.

United States v. Mullan, 10 Fed. 785.

There is, likewise, the fundamental rule of construction of statutes that Congress is not to be presumed to have used words without a purpose; that superfluous words are not to be presumed to have

been used, and that a statute must be expounded, if practicable, so as to give some effect to every word.

Platt v. Union Pacific R. R. Co., 99 U. S. 48.

I am not convinced by the defendants' argument that the act of Congress under examination was "in no sense a grant," and that the usual rules of construction applicable to grants are not pertinent. True, the object of the legislation was an exchange of lands, but the lands surrendered had been vested in the railroad company under a public land grant act, and as those to be selected were also to be public lands, title to which should be vested by patent from the United States, in the absence of words clearly indicating a different intention, it is but reasonable to hold that the right of selection of the lieu land was subject to such construction as governed grants of lands at the time of the passage of the act under which such selection might be made. Mullan v. United States, supra. The lands to be selected still retain the general character of a donation, and in selection, the very valuable right has been given to the grantee to choose its lieu lands from any non-mineral public lands, when classified, lying in any state into or through which the railroad of the Northern Pacific Railway Company runs. This opportunity was doubtless regarded as a strong inducement to the railroad company. But whether we call the act one of grant or exchange, it was authority for a transfer of a nature such as to justify applying to the statute the rule of construction that nothing passes by implication, and unless the words of the grant are clear and explicit as to

the land conveyed, that construction which is most favorable to the Government should prevail.

United States v. Oregon etc. R. R., 164 U. S. 527.

Leavenworth etc. R. Co. v. United States, 92 U. S. 740.

Now, under these principles, it cannot be well held that Congress contemplated changing its policy by giving to the railroad company choice of any public lands in any of the states through which its road runs, though of a kind infinitely more valuable than the kind out of which those that were surrendered to the Government by the railroad company, were taken; yet defendants' argument would put gold, silver and other precious metals all within the classes of lands from which selection might be made, provided the lands containing them had been classified as nonmineral at the time of survey.

In my judgment, the intent of Congress is best gathered by co-ordination of the language of the statute with relation to this general policy of the Government, to the condition of the country when the act under examination was passed, and to the decisions of the Supreme Court, as referred to. Doing this, I find, not that there was an enlargement of the right of selection to classes of public lands outside of those which are reserved, but that the general authority to select "an equal quantity of nonmineral public lands," means selection from the nonmineral public lands, and only from nonmineral public lands.

The particular words following the general characterization of lands so authorized to be selected, confine the right of selection to lands already classified as nonmineral, or to those which shall be so classified. Any lands selected, however, must always be of the general class, nonmineral, and must have been so classified in the past, or must be so classed in the future. That is to say, the fact of their nonmineral character must exist, and though classification is essential before the right of selection attaches, yet if the lands are nonmineral, the fact that they have been "so classified" does not operate as a binding determination that they were nonmineral in character, and preclude the Government from asserting its right to have lands which are mineral in fact excluded from those out of which selection may be made. True character, and not classification without regard to true character, is the fundamental meaning.

I accord most respectful consideration to the views of the officers of the general land office of the Government, and admit the force of the arguments which attach must weight to rulings made in Davenport v. Northern Pacific Railway Company, supra, and in Ward v. St. P. & M. R. Co., decided by the commissioner on March 15, 1894, and to the fact that Congress knew the construction put upon the language of the act approved August 5, 1892 (25 St. at Large, 391), providing for the relief of settlers upon lands in North and South Dakota; but I cannot yield the view already expressed of what seems to me to be the accurate construction.

The complainant is entitled to a decree.

[Endorsed]: Title of Court and Cause. Memorandum Opinion. Filed April 3, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of May, 1909, the defendants filed their Assignment of Errors herein, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY, and NORTHWESTERN IMPROVEMENT COMPANY,

Defendants.

Assignment of Errors.

Comes now the above-named defendants in this cause and say, that in the decree herein, made and entered on the 8th day of April, 1909, in favor of the complainant and against the defendants ordering a cancellation of and delivery up of a certain United States patent to certain lands therein described, and quieting the title of the complainant to the said lands, and adjudging that these defendants have no right or title to any portion of the said lands described, there is manifest error, and they file this the following assignment of errors committed or

happening in the said cause, upon which they will rely on their appeal from said decree.

I.

Upon the Bill and Answer on file herein it was error of the Court to enter its decree herein in favor of the complainant.

II.

It was error of the Court to hold that it could review or go behind the classification of the lands in question by the Department of Interior of the United States.

III.

It was error of the Court to hold that the patent issued to the defendant Northern Pacific Railway Company for the lands in question was null and void.

IV.

It was error of the Court to hold that the classification of the lands in question herein by the Department of the Interior of the United States, classifying them as nonmineral, was not final by the terms of the Act of Congress under which the patent was issued.

V.

It was error of the Court to hold that the patent to the lands in question was in any way affected by the fact that the Northern Pacific Railway Co. had some knowledge of the character of the lands aside from the Government's report or classification.

VI.

It was error of the Court to hold that the language of section 3 of the act of Mar. 2d, 1899, "Being an Act to set aside a portion of certain lands in the

State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park" reading, "so classified as nonmineral at the time of the Government survey" meant that not only should the land be so classified, but should in addition be actually and in fact nonmineral.

VII.

It was error of the Court to hold a ruling of the Land Office Department of, and a ruling by the Department of the Interior of the United States upon a question as to what was the classification of lands as made by its officers under the law, erroneous, and hold the same open to question by this Court.

VIII.

It was error of the Court to hold that under the bill and answer the title of the defendants Rocky Fork Coal Company and Northwestern Improvement Company was in any way affected by any knowledge of the character of the lands which the defendant Northern Pacific Railway Company might have had.

IX.

The Court erred in not holding that the patent, issued by the complainant to the defendant railway company for the lands classified by the complainant as nonmineral, a good and sufficient title to the lands and in not quieting the title of the defendants to the lands herein involved.

Wherefore, the said defendants herein named, believing themselves aggrieved by the said decree of

the court made and entered herein as aforesaid, pray that the said decree may be reversed, and that a decree be entered herein adjudging that the patent to the defendant Northern Pacific Railway Company of the lands herein involved is a good and sufficient patent and transfer of the said lands and conveyed title thereto, and the title of these defendants to the lands in question be quieted and settled and the complainant be held to have no interest or title to the said lands and be restrained from asserting any therein.

WM. WALLACE, Jr.,
JOHN G. BROWN,
R. F. GAINES,
Solicitors for Defendants.

C. W. BUNN,
Of Counsel for Defendants.

Service of within assignment of errors made and admitted and receipt of copy acknowledged this 8th day of May, 1909.

J. W. FREEMAN,
WALSH & NOLAN,
Attorneys for U. S.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed May 8th, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of May, 1909, an Order Allowing Appeal was duly made and entered herein, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY, and NORTHWESTERN IMPROVEMENT COMPANY,
Defendants.

Order Allowing Appeal.

On this 8th day of May, 1909, came the above-named defendants, Northern Pacific Railway Co., The Rocky Fork Coal Co., and Northwestern Improvement Company, by their solicitors, John G. Brown, R. F. Gaines, Wm. Wallace, Jr., and C. W. Bunn, and moved the Court to allow an appeal from the decree of this court herein rendered and entered on the 8th day of April, 1909, in favor of the plaintiff herein and against the defendants, to the United States Circuit Court of Appeals for the Ninth Circuit.

On filing their assignment of errors by the said defendants, the Court does hereby allow the said appeal, and does hereby fix the amount of the bond on said appeal in the sum of Three Hundred ($300) Dollars; and the Court further orders that a certified

transcript of the record, proceedings and papers upon which said decree appealed from was based or rendered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 8th day of May, 1909.

ROBERT S. BEAN,
Judge.

[Endorsed]: Title of Court and Cause. Order. Filed May 8, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of May, 1909, defendants filed their Bond on Appeal herein, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY, and NORTHWESTERN IMPROVEMENT COMPANY,
Defendants.

Bond [on Appeal].

Know All Men by These Presents: That we, the Northern Pacific Railway Co., Rocky Fork Coal Company, and the Northwestern Improvement Company, as principals, and the National Surety Company, a corporation duly authorized to act as a surety, as surety, are held and firmly bound unto the

above-named plaintiff, the United States of America, in the sum of Three Hundred ($300.00) Dollars, for the payment of which well and truly to be made, we bind ourselves jointly and severally and each of our successors or assigns, firmly by these presents.

Sealed and dated this —— day of May, 1909.

Whereas, the above-named defendants have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree rendered in the above-entitled cause in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, on the 8th day of April, 1909, now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute the said appeal to effect and answer all damages and costs, if they fail to make their defense good, and obey the orders of the Court herein, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By WM. WALLACE, Jr.,
Its Division Counsel and a Solicitor herein.

THE ROCKY FORK COAL COMPANY,
By WM. WALLACE, Jr.,
Its Solicitor herein.

NORTHWESTERN IMPROVEMENT COMPANY,
By WM. WALLACE, Jr.,
Its Solicitor herein.

NATIONAL SURETY COMPANY, a Corporation,
By IDA L. EASTERLY,
[Corporate Seal] Res. Asst. Secretary.

The foregoing bond is hereby approved this 8th day of May, 1909.

R. S. BEAN,
Judge.

[Endorsed]: Title of Court and Cause. Bond. Filed May 8, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 11th day of May, 1909, a Citation was duly issued herein, which said Citation is hereunto annexed, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

No. 870.

UNITED STATES OF AMERICA,
Complainant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA, and NORTHWESTERN IMPROVEMENT COMPANY,
Defendants.

Citation on Appeal [Original].

United States of America,—ss.

The President of the United States to GEORGE F. WICKERSHAM, United States Attorney General, and JAMES W. FREEMAN, United States District Attorney for the District of Montana, Solicitors for Complainant:

You are hereby cited and admonished to be and appear at a session of the United States Circuit

Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the clerk of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, wherein United States of America is complainant and appellee and Northern Pacific Railway Company, The Rocky Fork Coal Company of Montana and Northwestern Improvement Company are defendants and appellants, to show cause, if any there be, why the judgment and decree rendered against the said defendants and appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable ROBERT S. BEAN, Judge of the District Court of the United States for the District of Oregon, presiding in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, this 11th day of May, 1909.

ROBERT S. BEAN,
District Judge.

I hereby, this 11th day of May, 1909, accept due personal service of this citation on behalf of the United States of America, appellee.

J. W. FREEMAN,
WALSH & NOLAN,
Solicitors for Appellee.

[Endorsed]: No. 870. In Circuit Court U. S., 9th Circuit, District of Montana. United States of America, Plaintiff, vs. Northern Pacific Ry. Co. et al., Defendant. Citation. Filed May 11th, 1909.

Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. Wm. Wallace, Jr., First National Bank Building, Helena, Mont., Attorney for Defendants.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 73 pages, numbered from 1 to 73 consecutively, is a true and correct transcript of the pleadings, process, decree, opinion, orders and all proceedings had in said cause, and of the whole thereof, as appears from the original files and records of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify and return that the costs of the transcript of record amount to the sum of Sixty-nine 10/100 Dollars, ($69 10/100) and have been paid by the appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court, Ninth Circuit, District of Montana, at Helena, Montana, this 15th day of May, A. D. 1909.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1719. United States Circuit Court of Appeals for the Ninth Circuit. The Northern Pacific Railway Company, The Rocky Fork Coal Company of Montana, and The Northwestern Improvement Company, Appellants, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed May 24, 1909.

F. D. MONCKTON,
Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NO. 1719.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA and THE NORTHWESTERN IMPROVEMENT COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF.

WM. WALLACE, JR.,
Solicitor for Appellants.

C. W. BUNN,
CHARLES DONNELLY,
Of Counsel.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NO. 1719.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA and THE NORTHWESTERN IMPROVEMENT COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF.

This is an appeal from a decree of the Circuit Court of the United States for the District of Montana, in a suit in equity brought by the United States to cancel the patents to certain lands patented by the government to the Northern Pacific Railway Company and by that Company conveyed, either directly or through the Rocky Fork Coal Company of Montana, to the Northwestern Improvement Company, and to enjoin the appellants from asserting further title to the lands. The hearing was had on bill and answer and resulted in a decree granting to the Government the relief prayed for.

The facts are undisputed and are as follows: March 2, 1899, the President approved an Act of Congress setting aside certain lands in the state of Washington as a public park to be known as the Mount Rainier National Park (30 Stat. at L. 993). Among the lands thus set apart were lands theretofore granted to the Northern Pacific Railroad Company; and Section 3 of the Act provided that upon the execution and filing by that company of a deed releasing and conveying to the United States the lands thus granted, that company should be authorized,

> "to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States."

July 19, 1899, the Northern Pacific Railway Company, as successor of the Northern Pacific Railroad Company, executed and delivered its deed conveying to the United States its lands within the proposed park, and thereupon became entitled to select and receive an equal quantity of the class of lands described in the passage above quoted.

In December, 1899, the Railway Company selected the lands for the recovery of which this suit was brought. These lands had been surveyed several years before and had been "classified as non-mineral at the time of actual Government survey." They did in fact contain deposits of coal of more or less value

and were in fact mineral lands. This was known by the Railway Company in December, 1899, when it selected them; and as stated in the bill, and implied in the interrogatories attached to the bill, and admitted in the answer, it was their possession of mineral value that prompted their selection, and they possessed little or no value except for the mineral which they contained. The selections were approved by the Register and Receiver of the local land office and transmitted to the Commissioner of the General Land Office at Washington. Thereafter, and previous to the issuance of patent, various persons seeking to enter portions of the land in question under the provisions of Sections 2347 and 2348 of the Revised Statutes of the United States, asked for the cancellation of the selections upon the ground that the lands in question contained valuable deposits of coal, and protested against the issuance of patents to the Railway Company. It was held by the Secretary of the Interior (*Davenport v. Northern Pacific Railway Company*, 32 Land Decisions 28, 30) that the Railway Company was entitled to select these lands under the Act of March 2, 1899, and accordingly on August 17, 1903, patent covering them was duly issued to the Railway Company. The title thus acquired has since passed, either directly, or through the Rocky Fork Coal Company of Montana, to the defendant Northwestern Improvement Company, which now holds it. Practically all of the stock of both of these companies has throughout been owned either directly or indirectly by the Northern Pacific Railway Company, and it is not contended that either of them has any higher

rights to the lands in question than those which the Northern Pacific Railway Company acquired.

All of the foregoing facts are to be gathered from the bill and answer. There is no dispute concerning them. There is, in fact, no opposition between the averments of the bill and those of the answer, except as regards the averment in the bill that the verifications of the selections were false. This averment is denied. The verifications were strictly true. They contained the statement that the lands had been found upon examination to be non-mineral in character, and it is conceded in the bill that they had been so found and classified. There being so little opposition of statement in the pleadings the point is not of much importance, but it is to be noted that, the cause having been set down for hearing on bill and answer, the material allegations of the answer are to be taken as true and the allegations of the bill not admitted are to be taken as untrue. *Bates Federal Equity Procedure,* Sections 327, 680 and cases.

SPECIFICATIONS OF ERROR.

1. The Court erred in holding that the return of the Government survey was not decisive as to the character of the land.

2. The Court erred in holding that complainant was entitled to a decree.

ARGUMENT.

The question presented is purely one of statutory construction; and the proposition which the Government must establish in order to prevail is that the Land Department made a mistake of law in construing the Act of March 2, 1899, as authorizing the selection of lands classified as non-mineral regardless of their character in fact. If that Act was rightly so construed the bill should have been dismissed.

That this is the correct construction of the language in question has been the uniform holding of the Interior Department. The Act of March 2, 1899, was modeled after a previous Act of Congress approved August 5, 1892 (27 Stat. at L. 391), providing for the relief of settlers upon lands in the states of North Dakota and South Dakota. By each of these Acts a railway company is given the right to select in lieu of lands relinquished to the Government, "an equal quantity of non-mineral public lands so classified as non-mineral at the time of actual Government survey." The Act of August 5, 1892, was construed by the Commissioner of the General Land Office on March 15, 1894, in the case of *Ward v. St. Paul, Minneapolis & Manitoba Railway Company.* In that case the lands involved had been selected by the Railway Company under the Act in question and Ward protested against their selection upon the ground that they contained "a ledge of gold and silver bearing quartz" and that the Railway Company "did not make selections of said lands in good faith but that the agent, when he made affidavit that said lands were non-mineral, then and there knew that said lands were valuable for the gold and silver bearing quartz thereon." Commis-

sioner Lamoreux in confirming the right of the Railway Company to the lands in question said:

> "Mineral lands are usually excepted from railroad grants whether reported as such by the Surveyor General or not, it being held that the discovery of valuable mineral deposits upon lands not shown to be mineral by field notes of survey, and not known to be of that character at date of definite location of railway or selection for railway purposes, "only proves that such lands were always mineral lands, and serves to bring them clearly within the exception clause of the grant." *(Central Pacific Railroad Company et al. v. Valentine,* 11 L. D. 238.)

By the act of 1892, however, the St. Paul, Minneapolis & Manitoba Railway Company, in consideration of its relinquishment of the Dakota lands, is permitted to select "an equal quantity of non-mineral public lands, *so classified as non-mineral at the time of actual government survey* which has been made or shall be made."

Had it been the intention of Congress to absolutely prohibit the acquirement of title by the company to mineral lands there would have been no necessity for the insertion of the clause relating to the classification of the lands at time of survey. This clause was evidently inserted for a purpose, and that purpose must have been to say to the company, in effect, you may take any lands of the United States otherwise subject to selection, not classified as mineral at time of survey, notwithstanding the fact that since the survey mineral deposits may have been discovered therein. This was a privilege conferred for a valuable consideration, viz.: The relief of citizens and grantees of the United States, occupying the Dakota lands, from liability to eviction from their homes.

The lands under consideration here may be mineral lands, as alleged by the applicant for con-

> test, and their character in that respect may have been known to the company's agent at date of selection, but they were "classified as non-mineral at the time of actual government survey," and I am of the opinion that they were legally subject, so far as relates to their mineral character, to selection under the act of August 5, 1892, and that there is nothing inconsistent with truth in the declaration by the selecting agent, made in his affidavit, that they "are not *interdicted* mineral . . . . and are of the character contemplated by said act."

Again in the case of *St. Paul, Minneapolis & Manitoba Railway Company,* 34 Land Decisions 211, the Secretary of the Interior, in construing the Act of August 5, 1892, held that the St. Paul, Minneapolis & Manitoba Railway Company had the right under the Act to select lands classified as non-mineral at the time of Government survey, notwithstanding the fact that the Commission appointed by the Act of February 26, 1895 (28 Stat. at L. 683), had examined them and found them to be mineral in character.

The case of *Bedal v. St. Paul, Minneapolis & Manitoba Railway Company,* 29 Land Decisions 254, is directly in point. In that case the Railway Company had made selection of certain lands in section 23, T. 31, North, Range 10, East, under the Act of August 5, 1892. The lands had been returned as non-mineral by the Government survey. Bedal and others protested against the approval of the selections upon the ground that they had located mineral claims on the lands selected. Thereupon the Railway Company was notified by the Land Commissioner that it would be required to give notice of its selections by publication and posting under the United States mining regula-

tions. The Railway Company appealed to the Secretary of the Interior, urging that the mining regulations were not applicable to selections made under the Act of August 5, 1892. The Secretary said:

> "The foregoing language of the act of 1892, as to the lands that the Railway Company might select in lieu of the Dakota lands upon their conveyance back to the Government, *does not seem to be ambiguous.* * * *
>
> The lands here involved, as before stated, were not classified as mineral at the time of the government survey, and the selections made before survey were thereafter adjusted to conform to such survey. *Being of the class subject to selection under the act of August 5, 1892, the allegations made in the protests are not sufficient to invalidate such selections, or warrant investigation as to the character of the land.* Furthermore, the provisions of paragraph 104 of the mining regulations are not applicable thereto. The selections by the railway company will therefore be submitted for approval as the basis of patent, if upon further investigation no other and sufficient reason appears to the contrary."

This decision is deserving of special consideration from the fact that, as appears from the initials at the head of the decision, it received the personal attention and approval of Honorable Willis Van Devanter, then Assistant Attorney General and at present a Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Appellants contend that the purpose of Congress in using the words "so classified as non-mineral at the time of actual Government survey" was to indicate definitely what lands should be available to the Railway Company in lieu of those which it relinquished, and to give certainty and security to the selections

made by thus definitely fixing what lands might be selected. If this was not the purpose of Congress in using those words it is difficult to explain their presence in the Act. Had it been the intention to confine the right of selection to lands which were *in fact* non-mineral, it would have been easy to say so; and if Congress had said so it is probable that, under the decision in the *Barden* case, 154 U. S. 288, the Railway Company would have been unable to acquire title to any lands *known* to be mineral at any time previous to the issuance of patent; and until patent issued the Railway Company could not know whether it had title to the lands or not. A simple restriction of the right of selection to "non-mineral lands" would have accomplished this result; and no additional words were necessary to accomplish it.

But such a result was not intended by the Act of March 2, 1899, nor would the Northern Pacific Railway Company have consented to the relinquishment of its lands in the state of Washington, had its title to the land it was to receive in exchange for them been subject to this uncertainty. From an early period in the history of the Government the law had required that the report of the official survey of public lands should be accompanied with a classification of their character; that classification had in general been found to be correct; and hence it was that in this Act of Congress (which was not a *donation* of lands but a mere agreement for the exchange of lands with which the Government was willing to part for other lands which it wished to obtain) the classification made at the time of survey was made the definitive test of the character of the lands, and the words "so classified as

non-mineral at the time of actual Government survey" were inserted in the Act as *defining* the phrase "non-mineral lands" as there used.

Additional support is given to this argument by the *Barden* case, supra. In that case the Railroad Company sought to recover lands confessedly mineral in character located within an odd numbered section in the place limits of its grant. From the grant to the company mineral lands had in terms been excluded; but the Act contained no reference to the classification made by the Government Surveyor, or to any test by which the question of their character might be determined. The lands involved in that case, though confessedly mineral in character, were classified by the Government Surveyor as agricultural or non-mineral; and it was argued on behalf of the Railroad Company that this classification was controlling. The court declined, however, to give this effect to the surveyor's classification on the ground that it had not been adopted by Congress as controlling and that the Surveyor General was not *authorized* to determine finally the character of the lands granted. When the Act of March 2, 1899, was passed, the *Barden* case had been decided, and when the Act of August 5, 1892 (in which the same clause, "so classified as non-mineral at the time of actual Government Survey," is found) was passed, that case was pending before the courts. Judge Sawyer, in the Circuit Court, had decided (46 Fed. 594), as he had previously decided in *Francoeur v. Newhouse*, 40 Fed. 618, that the exception of mineral lands in railroad grants applied only to lands *known* to be mineral at the time the grant attached; and the question whether this view was sound, as well as the question

what effect should be given to the classification of the Surveyor General were under consideration; and it was doubtless the purpose of Congress in both of these acts to reject Judge Sawyer's view and to give to the Surveyor General's classification an authoritatative force and determinative effect on the question whether lands were mineral or non-mineral in character.

It is to be remembered that the lands relinquished by the Railway Company in exchange for those involved in this suit were all within the place limits of that company's grant. Its title to them had vested on the filing of the map of definite location and as the original grant of 1864 did not reserve coal or iron, *all of the coal and iron in them belonged to it.* Congress did not expect, nor would the Railway Company for a moment have assented to a proposal, that lands of this character, held by such a title, should be exchanged for an uncertainty,—for a right of selection attended with the hazard of losing the land selected on a showing that its actual character was different from that given to it in the classification. As something definite was relinquished something definite was received in exchange for it, namely, an equal quantity of public land *ascertained and declared in proceedings free from any suspicion of fraud,* to be non-mineral in character.

In the case of *State of Idaho v. Northern Pacific Railway Company*, 37 L. D. 135, 138, decided September 5, 1908, the Secretary of the Interior says:

> "The act of March 2, 1899, *supra,* was not, like the act of July 1, 1898, *supra,* intended to operate as an aid in the adjustment of the railroad grant. Congress proceeded upon the theory

that so far as the land which the railway company was authorized to convey to the United States was concerned, its title thereto was perfect and that as to this land the grant had already been adjusted. It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act. A voluntary conveyance by the railway company was the most feasible method of reacquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department, every element of a contract is present in the act of March 2, 1899, *supra*, and the act is complete in itself. It should therefore be construed independently of other statutes having a different purpose and imposing other obligations. Thus considered, the construction of this act presents less difficulty, as standing alone it clearly authorizes the company to select land within the area classified under the act of February 26, 1895, *supra*, as freely as in any other portion of the territory to which its right of selection thereunder is restricted."

As suggested in the passage above quoted the Act in question is not in any sense a *donation* of lands and the principles which apply to grants made in aid of railroads, compelling a strict construction as against the grantee and in favor of the grantor, and which were applied in the *Barden* case, are not applicable

here. A very large quantity of land which the Government wished to set aside as a public park was held in private ownership. These lands the Government might, doubtless, have condemned; but unless it condemned them, it could acquire no rights in them except through the owner's voluntary relinquishment of them on terms acceptable to him. The Act in question expresses the terms on which the Railway Company relinquished its lands and it is to be construed like any other contract, not strictly as against one of the parties or favorably to the other, but with a view of arriving at what both parties intended and understood by it. So construed, we think, it clearly means that in exchange for certain definite lands the Railway Company shall have the right to select other lands *of which the character has been ascertained and declared in a certain definite way.* That mistakes might have been made in determining the character of the lands thus made available was, of course, recognized, and it is clear that a mistake *was* made in the classification of the lands in question; but there is no suggestion of fraud in the procurement of this classification or that this test was not as fair a one as could be applied without actual exploration of the lands. That department, whose office it is to administer the public land laws, had placed upon the language here in question the construction which we contend for. It had given that construction to the same language in a previous Act long before the Act of March 2, 1899, was passed and its provisions accepted by the Railway Company. In accepting the act appellants had a right to believe that it meant what the same language in the Act of August 5, 1892, had been held to mean,

and the Government should not now be permitted to say that it meant something else.

There is no difficulty whatever in supposing that Congress meant to make the surveyor's return the test of the character of the lands; nor does the adoption of that test involve any departure from the policy which the Government has hitherto pursued. It does not mean that the Government has abandoned its policy of withholding mineral lands from direct grants; on the contrary, the purpose of adhering to that policy is plainly evidenced by the Act. But from the very nature of the case, *some test* as to what lands are mineral and what are non-mineral must, *at some time,* be applied; and to be of any value as a test it must, in the absence of fraud or imposition (and there is no suggestion of either here), be final. Title to the vast quantities of land described as non-mineral, which in one form or another the Government has conveyed, cannot remain forever suspended, subject to being defeated at any time by the discovery of minerals in those lands.

By the decision in the Barden case, *supra*, the question whether lands were mineral or non-mineral was made to turn on the question whether mineral in paying quantities was known to exist in them at the time of the issuance of the patent. This test was unsatisfactory and accordingly the Act of February 26, 1895 (28 Stat. at L. 683), was passed for the purpose of determining in advance of the issuance of the patent whether the lands in the Northern Pacific grant were mineral or non-mineral in character: and by that Act, the return of the Commissioners is made decisive. Why is it unreasonable to suppose that as to lands

which it was exchanging for other lands which it wished to acquire, the Government thought it proper to give the same effect to the return in the Government survey, which, by the Act of 1895, is given to the return of the Commissioners?

The court below in its opinion (Rec. p. 70) says:

> "It cannot be well held that Congress contemplated *changing its policy* by giving to the railroad company choice of any public lands in any of the states through which its road runs, though of a kind infinitely more valuable than the kind out of which those that were surrendered to the government by the railroad company, were taken; yet defendant's argument would put gold, silver and other precious metals all within the classes of lands from which selection might be made, provided the lands containing them had been classified as non-mineral at the time of survey."

But there is no change of policy. The law as it exists to-day, as it has existed from the date of the grant to the Northern Pacific Company "puts gold, silver and other precious metals within the classes of lands" to which that company may rightfully take title, *provided* those lands were, at a particular time, *thought* not to contain those metals. By the decision in the Barden case that time was fixed as the date of the issuance of the patent. By the Act of February 26, 1895, it was fixed as the date of the approval of the report of the Commissioners; and by the Act here in question it is fixed as the date of the surveyor's return.

Viewed as an original question, therefore, we submit that all of the arguments favor that construction which the Government has heretofore placed on the

act. But if we assume that the meaning of the Act is *doubtful,* the same result is reached. Now, that its meaning is doubtful the court below expressly says. He says that "to adopt the construction asked for by the Government is not wholly satisfactory in that it calls for the practical insertion of the conjunctive into the text." And again he says that "We must regard the case as one *where the letter of the law has failed to convey a clear meaning.*" (Rec. p. 67.)

We respectfully submit that in construing a statute of which the meaning is conceived to be thus ambiguous and uncertain, principles repeatedly announced by the Supreme Court of the United States require that it be given that construction which the executive department has placed upon it.

U. S. v. Moore, 95 U. S. 760;
U. S. v. B. & Mo. River R. R. Co., 98 U. S. 334, 341;
H. & D. R. R. Co. v. Whitney, 132 U. S. 357, 366;
Heath v. Wallace, 138 U. S. 573, 582;
Orchard v. Alexander, 157 U. S. 383;
Hewitt v. Schultz, 180 U. S. 139, 157.

In *Hastings & Dakota Railroad Company v. Whitney, supra,* the court says:

> "It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *United States v. Moore,* 95 U. S. 760, 763, this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. . . . The officers concerned are usually able men, and masters of the subject. Not un-

frequently they are the draftsmen of the laws they are afterwards called upon to interpret.' "

In *Heath v. Wallace, supra,* the court says:

"Moreover, if the question be considered in a somewhat different light, viz., as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. For, as said in *United States v. Moore,* 95 U. S. 760, 763, 'the officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.' "

In *Hewitt v. Schultz, supra,* the court says:

"But without considering the matter as if it were for the first time presented, *it is sufficient to say that the question before us cannot be said to be free from doubt.* The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas and Smith, and upon which the Land Department has acted since 1888. 'It is the settled doctrine of this court,' as was said in *United States v. Alabama Great Southern Railroad,* 142 U. S. 615, 621, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be preju-

diced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864."

We therefore submit, first, that viewed as an original question, the construction heretofore placed upon this act has been the correct one; and, second, that viewing the Act as of doubtful meaning, the principles announced in the foregoing decisions call for the adoption of that construction of it which the Department has heretofore given it. From either standpoint the decree should be reversed.

WM. WALLACE, JR.,
Solicitor for Appellants.

C. W. BUNN,
CHARLES DONNELLY,
Of Counsel.

No. 1719.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA, and THE NORTHWESTERN IMPROVEMENT COMPANY,

Appellants.

BRIEF OF APPELLEE.

THE ATTORNEY GENERAL OF THE UNITED STATES,
M. C. BURCH,
FRANK HALL,
FRED A. MAYNARD,
JAMES W. FREEMAN, and
WALSH & NOLAN,

Solicitors for Appellee.

T. J. WALSH,

Counsel for Appellee.

United States Circuit Court of Appeals

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THE NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA, and THE NORTHWESTERN IMPROVEMENT COMPANY,

Appellants.

BRIEF OF APPELLEE.

I.

STATEMENT OF FACTS.

The exigencies of the case, including intervening engagements of counsel, require the preparation of this brief on the part of the appellee before it has been furnished with the argument of the appellants, service not having been made at the present date, October 8, 1909. The discussion herein may, accordingly, leave unanswered some consideration that may be advanced or dwell at unnecessary length upon propositions not seriously relied on to

overturn the decree appealed from. The brief will endeavor to meet the views presented to the lower court in behalf of the position taken by the appellants.

The appellee brought this suit to annul patents which had been issued to the appellant Northern Pacific Railway Company for 1120 acres of coal land in the county of Carbon, State of Montana.

This land was selected by the company and subsequently patented to it, under the provisions of an Act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as "Mount Ranier National Park," section three of which reads as follows:

> "That upon execution and filing with the Secretary of the Interior by the Northern Pacific Railroad Company of proper deed releasing and conveying to the United States the land in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized *to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made*, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States. * * "

Section four providing for the issuance of patents is as follows:

"That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analagous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the land so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

The bill of complaint alleged compliance on the part of the Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company with the condition precedent prescribed by the act, the selection of the lands in question in lieu of those surrendered, and the issuance of patents for them to it.

Accompanying the selection was an affidavit by the Land Commissioner of the railway company reciting among other things that the lands selected "are vacant, unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899."

The bill averred that the lands in question were, at the time of the selection, public mineral lands, that they contained large deposits of coal and were chiefly valuable on account of the coal in them, and that all these facts were known to the appellant railway company at the time and before it made the selection.

The court was apprised by further averments that the lands had been conveyed, after patent, through the appellant Rocky Fork Coal Company to the appellant Northwestern Improvement Company, alleged to be subsidiary companies, taking with notice.

Interrogatories were appended to the bill intended to draw from the appellants admissions of facts tending to establish the averments of the bill.

Transcript, pages 2-29.

The answer denied certain averments of the bill characterizing the acts of the railway company as fraudulent, but expressly admitted the basic facts above referred to as having been averred in the bill, including the averments that the lands were public mineral lands when selected, chiefly valuable for the coal contained in them, and that these facts were well known to the railway company before selecting them, as well as the facts negativing any claim of bona fide purchase by the other appellants.

The answer set out, however, "that the lands described in the bill of complaint, and each and every subdivision thereof, had been returned and classified as non-mineral by and at the time of the actual government survey", and insisted that by reason of such fact they were subject to the

defendant railway company's selection, and being free from other claims and rights, were properly selected and validly patented to said defendant.

Transcript, pages 45-56.

It should be here stated that the bill averred that the selections having been made, certain persons desirous of entering the lands in question as coal lands before the patents issued, instituted proceedings before the land department to procure the cancellation of the selections, but that the Commissioner of the General Land Office and the Secretary of the Interior erroneously held and decided that if the lands had been, prior to their selection, classified as non-mineral at the time of the actual government survey, as it was by them held they had been, the railway company was entitled to select them though they were mineral (that is, coal) lands and it knew them to be such.

Transcript, page 12.

The decision of the secretary referred to, as to one of the tracts, is found in the official reports of his office on land cases,

Davenport v. N. P. Ry. Co. 32 L. D. 28,

hereafter to be referred to.

The answer maintains that the ruling of the department in the premises was correct,

Transcript, pages 49-50.

and the record presents for the consideration of this court the conflicting contentions of the parties as to the true interpretation of Section 3 of the Act of March 2, 1899.

It requires an answer to the question, May the Northern Pacific Railway, under the provisions of that act, select and have patented to it, mineral lands of the United States, knowing them to be such, provided they have theretofore been erroneously classified by the surveyor making the regular government survey as non-mineral? The circuit court held that it could not and annulled the patents.

Memorandum Opinion, Trans. 64.

A reversal of that ruling is sought by this appeal.

II.

ARGUMENT.

Upon a proper interpretation of the act above referred to, the rights of the parties to this litigation rest.

In seeking that, the fundamental principle must be kept in mind that every reasonable intendment must be made in favor of the government and against the beneficiary of an act making a grant of public lands, and that in the construction of such acts all reasonable doubts as to the meaning are to be resolved in favor of the public.

This doctrine has been so often announced by the Supreme Court of the United States as to be familiar learning. It has itself so repeatedly asserted it that it will not be altogether inappropriate to quote here from the language of some of the opinions. In

U. S. v. Ore. & Cal. R. Co., 164 U. S. 526,

the court said:

> "The rule of construction applicable to the granting act is the familiar rule that all grants of this descrip-

> tion must be construed favorably to the government, and that nothing passes but what is conveyed in clear and explicit language. Dubuque & P. R. Co. v. Litchfield, 64 U. S. 23 How. 88 (16:509); Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 740 (23:637); Slidell v. Grandjean, 111 U. S. 437 (28:329); Coosaw Min. Co. v. South Carolina, 144 U. S. 562 (36:542)."

The opinion by Chief Justice Fuller quoted from the language used in

> Sioux City & St. P. R. Co. v. U. S. 159 U. S. 349, 360,

in which the court spoke through Mr. Justice Harlan as follows:

> "If the terms of an act of Congress, granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.' Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 740 (23:634, 637)."

In

> Atlantic & Pac. R. Co. v. Mingus, 165 U. S. 413,

the court, speaking through Mr. Justice Brown, said:

> "If there were any ambiguity in this act we should feel bound, upon familiar principles, to give the government the benefit of the doubt. Dubuque & P. R. Co. v. Litchfield, 64 U. S. 23 How. 66, 88 (16:500, 509); Leavenworth L. & G. R. Co. v. United States. 92 U. S. 733, 740 (23:634, 637); Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 562 (36:537, 542)."

The principle is by no means restricted in its application to grants of public lands, but applies to every legislative act, either of the nation or state, by which rights in public property are acquired. It was applied in the cases

above referred to, as it has been in many others, to grants of public lands to railroad companies, but many of the cases cited arose upon the construction of acts of the state legislatures, granting franchises or other rights to individuals or private corporations. Indeed, as said in

Northern Pacific R. Co. v. Barden, 46 Fed. 592-611,

the celebrated case of Charles River Bridge v. Warren Bridge, 11 Pet. 420, "is the foundation of much of the federal jurisprudence upon this point."

The proposition is so clearly put and the reason for the rule so luminously stated in a recent case,

Blair v. Chicago, 201 U. S. 400-471,

that a somewhat extended quotation from the opinion may be condoned. Mr. Justice Day in that case says:

> "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. Pierce, Railroads, 491; New Orleans & C. R. Co. v. New Orleans, 34 La. Ann. 447. 'Words of equivocal import,' said Mr. Chief Justice Black, in Pennsylvania R. Co. v. Canal Comrs. 21 Pa. 9, 22, 'are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature.' 'The just presumption,' says Cooley, in his work on Constitutional Limitations, 7th ed. p. 565, 'in every case is, that the state has granted in express terms all that it

designed to grant at all,' and, after quoting from the supreme court of Pennsylvania to the same effect, the learned author observes: 'This is sound doctrine, and should be vigilantly observed and enforced.'

"Since the decision in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the state, or municipalities acting under state authority. Concurrent with this principle, and to be considered when construing an alleged grant of this character, is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often-cited case of Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773, and has been uniformly applied in many subsequent cases in this court. In Perrine v. Chesapeake & D. Canal Co. 9 How. 172-192, 13 L. ed. 92-100, the same eminent Chief Justice, speaking for the court, said: 'The rule of construction in cases of this description * * * is this,—that any ambiguity in the terms of the grant must operate against the corporation, and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly exponded.' In the case of The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 75, 18 L. ed. 137, 143, it was said: 'The principle is this: That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the

one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state.'

"This principle has been declared axiomatic as a doctrine of this court. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666, 24 L. ed. 1036, 1038. In Slidell v. Grandjean, 111 U. S. 412, 438, 28 L. ed. 321, 330, 4 Sup. Ct. Rep. 475, it is declared a wise doctrine; 'It serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' Among other cases affirming the principle in this court is Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689, in which it was applied in adopting, of two doubtful constructions, the one more favorable to the state. Many of the cases are cited in a note to Knoxville Water Co. v. Knoxville, decided at this term. 200 U. S. 22, 34, ante, 353, 359, 26 Sup. Ct. Rep. 224, 227."

As it was one of the first cases in which the rule of the Charles River Bridge case was applied to grants of public lands to western railroads, the following quotation is made from the opinion in

Dubuque & Pac. R. R. Co. v. Litchfield, 23 How. 66.

"If we had doubts from any obscurity of the Act of Congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the Act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied. Charles River Bridge v. Warren Bridge, 11 Pet. 420.

"We concur with the following citation and reasoning of the plaintiff's counsel, to-wit: Lord Ellenborough, in his judgment in Gildart v. Gladstone, 12 East.

633, (an action for Liverpool dock dues), says: 'If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public, and against that of the company, because the comapny, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended.'

"'The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which cannot be obtained by plain and express terms.'"

In another early case often referred to for the proper construction of similar grants,

Leavenworth etc. R. R. Co. v. U. S. 92 U. S. 733,

the court by Mr. Justice Davis said:

"This grant, like that of Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the meaning and intent expressed in it. It should be neither enlarged by in genious reasoning, nor diminished by strained construction. The construction must be reasonable and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting the Act, but if they admit of different meanings—the one of extension, and the other of limitation—they must be accepted in a sense most favorable to the grantor. And if a right be asserted against the Government, it must be so clearly defined that there can be no question of the purpose of Congress to confer it. In other words, what is not given expressly, or by necessary implica-

tion, is withheld. R. R. Co. v. Litchfield (supra); Rice v. R. R. Co., 1 Black, 380 (66 U. S., XVII, 153); Charles River Bridge v. Warren Bridge, 11 Pet. 420."

The question for consideration is to be approached, further, in the full recognition of the settled policy of the government to reserve its mineral lands for disposition under laws specially applicable to them, and to reserve them expressly or impliedly from all grants in aid of works of internal improvement and even to the states for public purposes,

1 Lindley on Mines, 47.

As to the uniformity of such reservations and the fixed character of the policy adverted to, see further,

1 Lindley on Mines, 136, 152.

So well settled had this policy of the government become, that the Supreme Court held in

Ivanhoe Mining Co. v. Keystone Min. Co., 102 U. S. 167,

that mineral lands were impliedly reserved in the acts granting sections sixteen and thirty-six to the states for school purposes, there being no express reservation, in consequence of which the Supreme Court of California had repeatedly held that the state took those sections regardless of their character.

Hermocilla v. Hubbell, 89 Cal. 5.

In the Ivanhoe case the court, after referring to many acts in relation to the disposition of the public lands exempting from their provisions mineral lands, said:

"Taking into consideration what is well known to have been the hesitation and difficulty in the minds

of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from preemption and above all from grants, whether for railroads, public buildings or other purposes, and looking to the fact that from all the grants made in this Act they are reserved, one of which is for school purposes, besides the 16th and 36th sections, we are forced to the conclusion that Congress *did not intend to depart from its uniform policy in this respect* in the grant of those sections to the state."

In

Hawke v. Deffenbach, 22 N. W. 480-482,

it is said:

"The policy of the government to reserve from sale and from the operation of ordinary grants, general and special, its mineral lands, has been declared in so many statutes, and by so many adjudications of the supreme court of the United States, that it is unnecessary, at this time, to enter upon an extended review of the history of its legislation in this regard. One or two citations will be sufficient to show with what emphasis the policy referred to has been declared. In the case of U. S. v. Gratiot, 14 Pet. 538, decided in 1840, the court say: 'It has been the policy of the government at all times, in disposing of the public lands, to reserve the mines for the use of the United States; and their real value cannot be ascertained without causing them to be explored and worked under proper regulations.' And again, in the case of Mining Co. v. Consolidated Min. Co. 102 U. S. 174, decided in 1880, the court, after speaking of the government in respect to its mineral lands, say: 'Congress enacted, in 1866, a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands, as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.'"

In

Garrard v. Silver Peak Mines, 82 Fed. 587,

Judge Hawley said:

> "3. The 2,000,000-acre grant by the United States to the state of Nevada was not intended to include any mineral lands. Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611; Heydenfeldt v. Mining Co., supra. It has been the universal policy of the general government to exclude such lands from its grants."

The persistent policy of reserving mineral lands in railroad grants is adverted to by Mr. Justice Field in

Barden v. N. P. R. Co. 154 U. S. 288.

Recent acts of Congress show a steady adherence to the same policy. The lieu provision of the act of June 4, 1897, in relation to forest reserves permitted the selection to be made in exchange for the base lands only of "vacant land *open to settlement,*" which of course excluded mineral lands, as they are not open to *settlement.*

The amendment of this act by the act of March 3, 1901 more directly expressed the reservation by declaring that the right to select in exchange for a forest reserve should be "confined to vacant, surveyed *non-mineral* public lands which are subject to homestead entry."

The applicants take the position that in this instance for some reason, the nature of which is not disclosed, this time-honored policy was departed from and that Congress intended that the railroad company should be entitled to get such mineral lands as in the errors of the surveyor in that regard, notoriously frequent, were classified as non-mineral, and that in spite of the explicit declaration of the act, only non-mineral public lands should be subject to be taken.

Indeed, the purpose must be attributed to Congress to permit the selection of mineral lands of no inconsiderable extent though no error may have crept into the report of the official survey.

As is well known the character of lands as mineral or non-mineral, within the meaning of our statutes, is not altogether stable. Lands surveyed twenty years ago and classed as "mineral" may to-day, by the exhaustion of the deposits within them or by the development of the art of agriculture, the approach of markets, the increased facilities for transportation, be more valuable for agricultural purposes and consequently be "non-mineral" in character, and subject to disposition as such.

On the other hand, lands properly classified a score of years ago or a decade since as non-mineral, may, by reason of discoveries of mineral in lands adjacent, by economies now practiced in the business of mining and reducing ores, be now of fabulous value because of their mineral richness.

All such, it is claimed, Congress intended might be selected by the appellant railway company under this act. The fluctuations in the character of the public lands from "mineral" at one time to "non-mineral" at another is adverted to by the Supreme Court in

Richards v. Dower, 81 Cal. 44.

Now, that a statute is not to be construed so as to overturn a settled policy of the government, is obvious, and amply supported by authority.

In the case of

U. S. v. Shaw, 39 Fed. 433-436,

Judge Speer said:

> "When a statute which proposes to regulate proceedings in suits, is general, and by a doubtful application of its terms to government suits would divest the public of rights, and violate a principle of public policy, and would make provisions contrary to the policy which the government has indicated by many acts of previous legislation, in such case the statute ought not to be construed to impair the settled prerogatives of the government. U. S. v. Knight, supra."

The principle here appealed to is expressed by the Supreme Court of North Carolina in

> Meroney v. Atlanta B. & L. Assn. 47 Am. St. 841, 872,

in the following direct and explicit language:

> "When two constructions of a statute are possible, the court should adopt that which is most reasonable and in accord with the declared and recognized public policy of the state."

It is argued, however, that Congress did not intend to permit mineral lands to be taken, but inasmuch as the character of the lands as "mineral" or "non-mineral" must in all cases be determined before the issuance of patent where mineral lands are reserved, it was intended by this act to take the determination of that question out of the hands of the Commissioner of the General Land Office and the Secretary of the Interior, where it is lodged by the general provisions of the law,

> Barden v. N. P. R. Co. 151 U. S. 320-321,

and lodge it in the surveyor who does the work in the field.

Just why his view of it made *some* time before the selection and possibly a long series of years before, rather than the actual condition of affairs at the time the selection

is made, should control, was not suggested in the lower court, and is as difficult to divine as it is to understand why the Commissioner and Secretary should be divested in the administration of this act of the general inquisitorial power vested in them, and be compelled to accept as conclusive the return of the surveyor who is not employed as a classifying officer, who makes, and, under the rules of the department, is required to make only the most casual observation of the surface of the ground, whose profession does not fit him and who is usually unfitted to determine the mineral character of lands, where the subject is involved in any doubt.

The total unreliability of such returns as to the mineral character of public land has been made the subject of repeated comment by the Commissioner and of communications to Congress.

Lindley says:

> "While the rule which treats the surveyor general's return as establishing *prima facie* the character of the land is a convenient one in controversies arising between individuals over an asserted right to enter public lands, as determining upon whom rests the burden of proof, it has been productive of iniquitous results in administering the colossal land grants to railroad companies; and we are justified in asserting that its force as a universal rule has been materially weakened, if not absolutely destroyed, by the recent decisions of both the land department and the courts of last resort.
>
> "When it is considered that sections of one mile square are the smallest tracts the out boundaries of which the law requires to be actually surveyed; that the minor subdivisions are not surveyed in the field, but are defined by law, and protracted in the surveyor-general's office on the township plats, the lines

being imaginary; that surveyors, as a rule, are neither practical miners nor geologists; that they are compensated not for the volume of information furnished as to the character of the lands, but for the number of linear miles surveyed in the field; that their investigation as to the character of the land is wholly superficial,—it would seem that but little weight should be given to these returns. If the surveyor, in subdividing a township into sections, encounters a mine in active operation, we may find some mention of that fact in his field notes; but usually he does not go beyond this. A fair illustration of the unreliability of these returns in this respect may be found in almost all the mineral districts over which the public surveys have been extended. We note the following caustic criticism of the land department itself on this subject. In an official communication (March 11, 1872) from Mr. Drummond, commissioner of the general land office, to Mr. Delano, secretary of the interior, the commissioner says:

"'To illustrate the unreliability of the surveyors' returns as to the character of these lands, and the absolute necessity for the rule which, with your advice and consent, I have adopted, it may be proper to refer in this connection to some of the applications for patents for mines in California, the lands embracing which were returned on the official township plats as agricultural in character, the existence of mines therein not becoming known to this office until after the receipt of such applications for mining title.'

(Here follows a list of thirty-five mines.)

"'The foregoing claims are all within the Sacramento district, and many more could be enumerated were it necessary to illustrate the want of reliability of the surveyor's returns as to the character of these lands. * * * But with the kind of returns furnished it is totally impossible to determine whether any given tract in the mineral district is properly agricultural land within the meaning of the law or not, or whether this office could, with a due regard for the execution of the law, proceed to patent such as agricultural land, without further investigation.'

And in an earlier communication the same commissioner used the following apt language:

"'I am impressed with the conviction that it is neither in harmony with the spirit or intent of the laws of Congress, nor with the true public policy, to sanction the indiscriminate absorption of the lands in what has heretofore been known as the reserved mineral belt in the public domain under laws only applicable to lands clearly non-mineral, simply because the deputy surveyors failed to return the same as mineral in character. This view is strengthened by the fact that very many, in fact the majority, of the applications for mineral patents, are found upon consulting our official township plats to be within subdivisions not reported as mineral in character.'

"In a circular letter issued in December, 1871, to the registers and receivers of land offices in the mining regions of California, instructing them to withhold from agricultural entry a large number of townships, the same commissioner thus expresses his views:

"'Experience having shown that this office can not with any degree of safety judge of the character of these lands, whether mineral or agricultural, from the data furnished by such returns, and there being no authority of law for the employment of a competent geologist to investigate the matter, the head of the department has, in consideration of the public interests and to prevent the indiscriminate absorption of the mineral lands of the public domain through the instrumentality of insufficient returns, found it imperatively necessary to adopt the course herein announced, both for the protection of those who have already expended time, capital, and labor in opening and developing these mines, and those of the citizens of the United States who may hereafter desire to exercise their legal right to do so.'

"In the light of these conceded facts, it is a marvel that either the land department or the courts ever announced the doctrine that such returns were *prima facie* evidence of anything save their own inherent weakness and insufficiency for this purpose."

1 Lindley on Mines, 106.

In the Barden case, Mr. Justice Field said:

"Some weight is sought to be given by counsel of

the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868, and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural, and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon.

"Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties or to determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject."

It is simply inconceivable that Congress, in the light of the information generally possessed and available to it, should have intended to make the surveyor's return conclusive evidence of the non-mineral character of land sought to be selected, unless it deliberately intended to permit the railway company to acquire under its provisions no inconsiderable body of mineral lands,—a purpose which cannot be attributed to it in view of the other language of the act.

In the Barden case an effort was made to give conclusive effect to the return of the surveyor as to the lands involved in that action made in 1868, and it was in connection with this claim that the remarks of Justice Field above quoted were made. Congress recognizing how little

weight ought to be attached to such return, in the year 1895 passed an act providing for the appointment of a commission to classify the lands within the Northern Pacific grant in the states of Montana and Idaho. These commissioners were men presumably fitted for that special work, and provision was made in the act for a hearing on their return before the local land officers after public notice. Yet their duties required them to cover so extensive a field, their facilities for making explorations were so meager, that many thousand acres of land, valuable for mineral, doubtless, passed to the railroad company. Successful attacks were made on their classification, though there was no protest after public notice of the filing of the same, in order to afford a hearing as provided by the act, in

Lamb v. N. P. Ry. Co. 29 L. D. 102, and in
Rowand v. N. P. R. Co.,

the opinion in which, obtained from the Helena Land Office, is printed as an appendix hereto because not officially published. Indeed, no inconsiderable quantity was thus acquired by the railway company under circumstances such as indicated at least a high degree of inaccuracy in the returns, scarcely excusable on the grounds adverted to.

And it is understood that in deference to an awakened public sentiment in the states affected, bodies of land of considerable extent have been receded to the general government on proof of obvious error in classification.

These matters are here referred to merely to enforce the point that we must strive to find some meaning in the act other than an intent on the part of Congress to make the

return of the surveyor conclusive evidence of the character of any particular tract sought to be patented to the railroad company, under its provisions.

Guided by the rule that legislative grants are to be construed strictly against the grantee, and in the light of the acknowledged worthlessness of the return of the surveyor, as a determination of the mineral character of land which he surveys, let the particular language of the act be examined.

The appellee contends that under no circumstances can the railway company have a patent for mineral lands under this act, that there was no intention to take away from the Commissioner of the General Land Office and the Secretary of the Interior the power to determine, whenever an application should be made pursuant to any selection, for a patent to any particular lands under the act; that the plain meaning of the act is that both conditions mentioned in the act must co-exist in order to permit the selection, namely, the lands must be non-mineral and they must have been classified as non-mineral at the time of actual government survey.

The appellants contend that it is entirely immaterial whether the lands are, in fact, mineral or non-mineral, provided they were classified as non-mineral at the time of the actual government survey.

They ask the court to eliminate the words "non-mineral" and "so" and give to the act exactly the meaning it would have if the words in brackets in the following quotation

from the granting clause were omitted from it entirely, to-wit:

> "Said company is hereby authorized to select an equal quantity of (non-mineral) public lands (so) classified as non-mineral at the time of the actual government survey."

In the opinion of the learned judge of the Circuit court before whom the cause was heard, the contention made by the appellee requires the insertion of the word "and" in the clause above quoted before the word "so."

Transcript, page 66.

In a certain sense that is a correct statement of its position, but not altogether accurate. The word "public lands" in the language quoted is qualified by the adjective "non-mineral" which precedes it, as well as by the participial phrase, "so classified as non-mineral, etc.," which follows it. The lands must, in fact, be non-mineral and they must have been classified as non-mineral. The expression is good English as it stands, and yet the insertion of the copulative might contribute towards explicitness. "He was a black Tartar of the Ukraine breed," means exactly the same as "He was a black Tartar and of the Ukraine breed." The sentence might be paraphrased thus: "Said company is hereby authorized to select an equal quantity of non-mineral public lands *which have been or may hereafter be* so classified as non-mineral at the time of actual government survey."

Both conditions must exist in order to justify patent under this act. If upon tendering the lists the land officer finds the lands to have been classified at the time

of the actual government survey as mineral land, the selection is rejected. No inquiry is permitted as to whether that classification was right at the time it was made or was wrong, or whether at the time of tendering the selections it is right or it is wrong. If the land was not classified as non-mineral, the selection is rejected. If, however, the lands were returned as non-mineral the selection is to be filed and the inquiry as to whether the lands are in fact mineral or non-mineral is to be conducted by or under the direction of the Commissioner or the Secretary, as pointed out in the Barden case, preliminary to the issuance of the patent,—the patent to issue or not to issue in accordance with the determination made.

It is really not necessary to rely on the rules of construction above adverted to applicable to congressional grants, in cases of doubt arising from the obscurity of the language of the granting act, nor to strive to avoid convicting Congress of perpetrating almost an absurdity in making the return of the government surveyor conclusive as to the mineral character of the ground ~~by~~ the plats. The language obviously requires that the land be not only non-mineral in fact, but that it shall have been classified as such at the time of the actual government survey.

The construction plainly demanded by the language accords, however, with the strengthening public sentiment, which one expects to find reflected in legislation of approbation of the policy of reserving the mineral lands for disposition under laws specially applicable to them. The intention of Congress was to permit the usual inquiry to

be made into the mineral character of lands though they were returned as non-mineral, but to preserve absolutely those lands that had been returned as mineral, Congress not caring to invite an investigation to be instituted by the railorad company as to the correctness of the classification, involving expense to the government and subjecting it to the risks of the loss of valuable mineral lands, because its agents were less diligent in collecting evidence than those of the railroad company, less faithful, possibly, or less fortunately situated, for collecting or presenting to the land officers the facts in relation to the character of the land.

Experience had shown that the chances of error on the part of the surveyor in classifying as mineral, lands which were, in fact, non-mineral, were comparatively small. While, on the contrary, it was well known that it is a common error to return lands as non-mineral which should be designated as mineral lands. Indeed, it is only those lands upon which the surveyor finds mining development or improvements or which present such aspects to him as to satisfy him of their value for the mineral they contain, that he attempts to classify at all. Such lands he designates on his plats as mineral lands, usually making specific reference to them in his notes; the remainder are assumed to be non-mineral.

Davenport v. N. P. Ry. Co. 32 L. D. 28.

One naturally expects to find in recent legislation provisions still further safe-guarding the mineral lands rather

than such as would permit them to be absorbed by indirection.

Nor is there anything in the circumstances attendant upon the passage of this act or the subject matter with which it deals that would lead the mind to believe that Congress intended to permit, by this species of indirection, the selection of lands which were, in fact, mineral.

The act of July 2, 1864, making the grant to the Northern Pacific Railway Company, by which it obtained title to the relinquished lands referred to in Section 3 of the act in question did, it is true, provide that lands containing coal and iron should not be deemed mineral lands within the meaning of the act reserving mineral lands from the grant and lands containing such minerals passed under it.

As pointed out by the learned judge who heard this cause, the specific provision in that act exempting coal lands from the operation of the reserving clause, enforces the view that such lands, nothing to the contrary being said, are mineral lands. That they are, has been repeatedly decided.

Mullan v. U. S. 118 U. S. 271.
N. P. Ry. Co. v. Soderberg, 188 U. S. 526.

The appellants make no contention to the contrary, but specifically admit by their answer that they are such.

It does not appear, however, that the lands relinquished contained either coal or iron, and it is inconceivable that had they possessed any value on account of deposits of these valuable minerals at the very doors, it might be said,

of great commercial depots and seaport marts, of first consequence, the Congress would ever have thought of locking them up in a natural park, or that the railroad company would ever have surrendered them for any such purpose. It is presumable that they were, in the main, such lands as might be expected to be found in the neighborhood of a rocky mountain peak, possessing interest and possibly some value from a scientific or scenic standpoint, but scarcely of any great value either for agriculture or for mining.

It is to be borne in mind too that the construction of the act claimed by appellants would equally as well entitle them to select lands containing ores of the precious metals, none of which could they give in exchange, as well as lands containing coal and iron. According to their contention the railroad company may enter any of the public land states under this act and appropriate public lands rich in deposits of gold, silver, copper and lead, provided only they were carelessly returned as non-mineral or their character as mineral lands was not at the time of survey obvious, or their value because of the mineral wealth in them arose since because of changed conditions or new inventions and discoveries.

The appellants ask the court to take liberties with the language which the repeated adjudications of the courts forbid. It is a cardinal rule of the construction of statutes that effect must, if possible, be given to every word in it.

"The rule is that a statute ought, upon the whole,

to be so construed that, if possible, no clause, sentence or word shall be superfluous, void, or insignificant."

State of Wisconsin v. Cunningham, 15 L. R. A. 561-577.

The following expression of the rule is quoted from Platt v. U. P. R. R. Co. 99 U. S. 424:

"The admitted rules of statutory construction declare that a Legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In Com. v. Alger, 7 Cush. 53-89, it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it. So, in People v. Burns, 5 Mich. 114, it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is Dearborn v. Brookline, 97 Mass. 466; and in Gates v. Salmon, 35 Cal. 576, it was ruled that no words are to be treated as surplusage or as repetition."

It is asserted, however, on the part of the appellants, in support of the decision of the Secretary as reported in the Davenport case, that the rule of strict construction applicable to congressional grants should not have weight in determining the meaning of this act, because it has reference only to grants in the nature of donations. Here, it is asserted, is a case of exchange of lands, a case in which the railroad company pays a valuable consideration for the privilege it gets, a case of barter, a contract entered into between the parties, a case in which the government through the act in question makes a proposition to the railroad company, which it accepts.

Really, as above stated, there is no need to appeal to the rule of strict construction, but the contention of appellants in this regard is baseless. Every act of Congress granting lands to railroad companies is in the nature of a contract. No lands were ever granted to any railroad company as a gift. Every grant of that character was made in consideration of benefits which were to accrue, or were supposed to accrue, to the public. Every such grant implies a bargain between the government on the one side and the beneficiary of the act, if it may be so designated, on the other. In Blair v. Chicago, as quoted above, the court said:

> "Since the decision in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the state, or municipalities acting under state authority."

Speaking of the act under which the original grant to the Northern Pacific Railroad Company was made, the Supreme Court of Montana said in

Northern Pac. R. Co. v. Carland, 5 Mont. 179;

> "It may be said that the government of the United States told the Northern Pacific Railroad Company, in language which no one can misunderstand, that if they would construct and complete their great work of internal improvement, which was an experiment, involving the expenditure of millions of money, the right of way through the public lands in the territory should be exempt from taxation. The exemption from taxation formed a part of the consideration for the undertaking and contract on the part of the company. This contract cannot be impaired by the na-

tional legislature, much less by an act of a territorial legislature, which owes its existence to its organic act given by congress. As well might such territorial legislature undertake to repeal the organic act which called it into being as a territory.

"One of the purposes of the government in incorporating the Northern Pacific Railroad Company, and granting to it certain of the public lands, and the right of way through the same, was to promote the public interest and welfare, and to secure to the government at all times the use and benefits of the road for postal, military and other purposes. Section 20 of the act of incorporation is as follows: 'That the latter, to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter or repeal this act.'

"The purpose and object of the government in incorporating the plaintiff was to promote the public interest and welfare, by securing the construction of a railroad extending from the great lakes to the Pacific ocean; and to accomplish this purpose it had the right to contract with any company, and to grant to such company rights and privileges sufficient to carry out and consummate the purpose aforesaid."

A grant to the state of swamp lands on condition that it reclaim them is a contract.

McGehee v. Mathis, 4 Wall. 143.

So, likewise, it has been held, is a grant made to the state on its admission to the union.

Roberts v. M. K. & T. Ry. Co. 22 Pac. 1006.

Nor is the act distinguishable in that it constitutes a proposition made by the government to the railroad company, which it has accepted.

So were all the acts creating the Pacific railroad corporations, which acts confessedly fall under the operation of the rule of strict construction.

They likewise were in the nature of propositions to the persons named as constituting the body corporate to the effect that if they would organize and construct the road the government would patent to it the lands mentioned in the act.

The Northern Pacific act specifically provided:

> "Sec. 12. And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railorad Company shall be signified in writing under the corporate seal of said company, duly executed, pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States."

The assumption that the public were extremely desirous of obtaining title to all the lands within the proposed park, and that the act in question was framed by officers of the general government, scrupulously careful of its interest ,and desirous of driving an excellent trade on behalf of or by public spirited citizens imbued with a zealous desire to see the park created, and holding out tempting inducements to the railroad company to let go, is lacking in any foundation in either the history or the language of the act.

The alacrity with which the railroad company tendered its deed of relinquishment after the passage of the act, is

evidence that the bill probably met with no great resistance from it in its passage.

Undoubtedly it offered to exchange because it believed it could select beter lands elsewhere—lands that would sell for more money. It went into the transaction because it thought it would be profitable to do so. There is no more reason for doubting that it had a hand in the preparation of this act than there is for doubting the soundness of the reason given by the courts for the rule under consideration, namely that acts of the character to which the rule is applicable "are usually prepared by those interested in them."

The argument advanced in this connection is not a new one. As will appear from the quotations made above, the opinions applying the principle to congressional grants to railway companies of public lands, refer quite uniformly to the Charles River Bridge Case, 11 Pet. 420, as authority.

In that case, Mr. Justice Story dissented and, with the wealth of learning for which he was famous, insisted that the court had erroneously applied a principle of the interpretation of crown grants, not parliamentary or legislative grants; that even as to crown grants the rule applied only where the grant was made on the solicitation of the subject, not from the special grace of the king and on his own motion, nor grants made upon a valuable consideration, but only to those springing from the mere bounty of the king.

11 Pet. 589.

On the last mentioned point his views may be gathered from the following excerpt from his opinion at page 597.

> "But, what I repeat, is most material to be stated, is, that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract. Such was the doctrine of my Lord Coke, and of the venerable sages of the law in other times, when a resistance to prerogative was equivalent to a removal from office. Even in the worst ages of arbitrary power and irresistible prerogative, they did not hesitate to declare that contracts founded in a valuable consideration ought to be construed liberally for the subject, for the honor of the crown. (2 Co. Inst., 496; see, also, Com. Dig., Franchise, C. F. 6). If we are to have the grants of the Legislature construed by the rules applicable to royal grants, it is but common justice to follow them throughout, for the honor of this republic. The justice of the Commonwealth will not (I trust) be deemed less extensive than that of the crown."

The quotations from the later opinions of the Supreme Court of the United States show how completely the conflicting opinion of the majority of the court has been adopted as the law. The court held that the grant of a franchise in that case was a contract and that the construction and maintenance of the bridge was the consideration paid for the rights conferred, but that, notwithstanding, the rule of strict construction applied. From this doctrine the court has never receded.

In the case of

Rice v. Minn. N. W. R. Co. 1 Black 358,

express reference was made to the dissenting opinion of Judge Story in the Charles River Bridge case. The case was the construction of a grant of lands to a railroad company. How completely the court rejected the argument of the learned justice referred to, is apparent from the following extract from the opinion:

> "Legislature grants undoubtedly must be interpreted, if practicable, so as to effect the intention of the grantor; but if the words are ambiguous, the true rule of construction is the reverse of that assumed by the defendants, as is well settled by repeated decisions of this court. Chas. Riv. B'g v. Warren B'g, 11 Pet. 544.
>
> "Most of the cases bearing upon the point previously decided were very carefully reviewed on that occasion and, consequently, it is not necessary to refer to them. Judge Story dissented from the views of the majority of the judges, but the opinion of the court has since that time been constantly followed. Later decisions of this court regard the rule as settled, that public grants are to be construed strictly, and that nothing passes by implication. That rule was applied in the case of Mills v. St. Clair Co., 8 How. 581, and the court say the rule is, that if the meaning of the words be doubtful in a grant, designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if those do not support the right claimed, it must fall. Any ambiguity in the terms of the contract, say the court in the case of The Richmond R. R. Co. v. Louisa R. R. Co., 13 How. 81, must operate against the corporation, and in favor of the public, and the corporation can claim nothing but what is given by the Act. Perrine v. Chesapeake Can. Co., 9 How. 192. Taken together, these several cases may be regarded as establishing the general doctrine,

that, whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. Ohio Life and Trust Co. v. Debolt, 16 How. 435; Com. v. The Erie & N. E. R. Co., 27 Pa. St. 339; Stourbridge Canal v. Wheeley, 2 B. & Ad. 792; Parker v. Great Western R. Co., 7 Man. & G. 253."

It may well occasion some surprise to note that in the case of

Hyman v. Read, 13 Cal. 444,

the Supreme Court of California, in an opinion written by Terry, C. J., adopts the reasoning and the conclusion of the dissenting opinion of Mr. Justice Story in the Charles River Bridge case, apparently as though it were in accord with the decision of the court. The report records Field, J. as concurring, but if the doctrine announced ever did receive his assent, he subsequently bowed to the accumulated force of repeated decisions of the Supreme Court of the United States, for, in the case of

Slidell v. Grandjean, 111 U. S. 412,

speaking for the court, he said:

"It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. Charles

> River Bridge Co. v. Warren River Bridge, 11 Pet. 536; R. R. Co. v. Litchfield, 23 How. 88 (64 U. S. XVI, 509); The Delaware Railroad Tax, 18 Wall. 206 (85 U. S. XXI, 888). The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the Act, and thus sanctions only open dealing with legislative bodies."

The argument that the rule of strict construction is not applicable to grants made upon a valuable consideration is both ancient and unsound.

Then it is advanced that prior to the passage of this act, another act similar in terms had been construed by the Commissioner of the General Land Office, as contended for here by appellants, and that Congress must be deemed to have used the language under consideration as signifying what the Commissioner declared it did in the earlier act.

The opinion of the Commissioner referred to is found quoted at page 6 of the brief of appellants, now before the writer. It will be scarcely asserted that the opinion discloses anything more than the most superficial consideration of the meaning of the act. It is advanced that the privilege was conferred for a valuable consideration, though how that should or does affect the question is not shown.

It is declared that "had it been the intention of Congress to absolutely prohibit the acquirement of title by the company to mineral lands, there would have been no necessity for the insertion of the clause relating to the classification of the lands at the time of the survey."

In this remark is disclosed the idea of the Commissioner that Congress intended by that act that the railroad company should get some mineral lands, and that notwithstanding that the act, as does this act, expressly declared that only non-mineral lands were open to selection and the lands which it relinquished were in a region devoid of mineral, and the act making the original grant contained the usual reservation of mineral lands.

The purpose of inserting the clause referred to is canvassed above. It was inserted to further insure the mineral lands against absorption under the act, not to invite it. There is no argument of the question in the opinion at all. It merely asserts that this clause was evidently inserted for a purpose, and that purpose must have been to say to the company, in effect: "you may take any lands of the United States otherwise subject to selection, not classified as mineral at time of survey."

It is easy to find that significance in the act if one utterly ignores the all important word "non-mineral", which serves to designate the lands subject to selection just as well as does the classification clause. Why should either be disregarded in the effort to find the class of lands open to selections? The opinion cannot be accepted as a correct construction of the act. What reason is there for supposing that Congress adopted it as such?

The opinion of the Commissioner in the case referred to seems never to have been published, and there is no reason to believe that either the Congress or the President, on the one hand, or the appellant railroad company, on

the other, had any knowledge of its existence at the time of the passage of the act or prior to the relinquishment by the company of its lands within the reservation.

There is a rule of law that when language used in a statute has previously been judicially interpreted, the meaning given to it by the courts is that which the legislative body intended it should have in the later act. That doctrine presupposes the publication of the opinion construing it, or such notoriety as to render it likely that the legislative body was aware of the construction which had been placed upon the language.

If the rule ever was by any court extended to embrace a construction given to an act by a subordinate executive officer, a careful search has failed to disclose the adjudications. Nor are we aided by reference to any such or to the works of any writers asserting any such rule.

On the contrary it has been expressly held that it does not in

Dollar Savings Bank v. U. S. 19 Wall. 227.

In that case persuasive if not conclusive effect was sought to be given to a ruling of the Commissioner of Internal Revenue, in relation to certain language in an act carried into a later law. The court declined to accede to the suggestion, held that he was not a judicial officer, and, therefore, his rulings could not be considered judicial constructions, and that there was no presumption that his decisions were brought to the knowledge of Congress before the later act was passed.

But appeal is made to the rule or long continued con-

struction by the executive department charged with the administration of the law. Attention is invited to the case

St. Paul M. & M. R. Co., 34 L. D. 211,

apparently an ex parte application, that does not even profess to deal with the question here involved. It simply holds that the classification referred to in the act is that made when the survey is made, by the regular government surveyor, not the classification made by the Commissioners under the act of 1895.

The only other departmental decision referred to is

Bedal v. St. P. M. & M. R. Co. 29 L. D. 254.

That case arose under the same act as the one considered by the Commissioner above referred to, the Act of August 5, 1892. It equally makes no attempt to construe that act, and was not promulgated until after the passage of the act here involved.

Selections were filed by the railroad company against which protests were filed by certain mineral claimants. They were dismissed, not because the Secretary, Mr. Hitchcock, who, as is understood, was not a lawyer, thought the railroad company had a right to select mineral lands, if they had been returned as non-mineral, but because one was too "vague and indefinite," and the other alleged a mineral location "long after the government survey, *and the selection of the land by the railway company.*"

Of course the protestant, to have any case at all, would be obliged to allege the mineral character of the land at and before the date of selection. It was of no consequence

that it became known *after* the selection that the lands were valuable for the mineral they contained.

The Secretary did not hold that the fact that the lands had been returned as non-mineral ended the inquiry, but that "the allegations made in the protests are not sufficient to invalidate such selections *or warrant investigation as to the character of the land.*"

This plainly means that had the protests been sufficiently specific as to the mineral character, had they averred the known mineral character of the lands prior to the filing of the selections, an investigation would have been ordered, notwithstanding the lands appeared by the surveyor's return to be non-mineral.

In view of the fact, as disclosed by the opinions to which the court has been referred, that this question was never even considered by the Secretary until it came up in the Davenport case with reference to these very lands, it is scarcely necessary to dwell upon the rule appealed to, that uniform and long continued construction of an act by the department of the government charged with its execution is given great weight by the courts, and in cases of grave doubt is followed by them.

It might be noticed, in passing, that even the Davenport case rests rather upon the fact that the protests did not go back in their assertion as to the known mineral character of the land to a time prior to the filing of the selection, than upon an interpretation of the act in question in conformity to appellants' contention. The opinion says:

> "In said protest it is alleged that coal declaratory statement was offered for this land on April 4, 1901, and that the land contains large and valuable deposits of coal, which, when mined, will be of a merchantable quality, but the filing of a coal declaratory statement nearly a year after a lieu selection under the act of March 2, 1899, is regularly presented cannot of itself affect the lieu selection, nor is such a selection affected by a protest, filed nearly a year thereafter in which it is stated, not that the land was known to be mineral at the time the selection was presented, but only that at the time of the filing of the protest it then contains valuable mineral deposits which when mined will be of merchantable quality."

The cases cited by the appellants on the force of executive construction, in the main, presented question that had received the profoundest consideration from Secretaries learned in the law, of whose opinions, from the exhaustive investigation they disclose, the logic they pursue, the comprehension of legal principles they exhibit, justly entitle them to rank with those of the highest judicial tribunals.

It is apparent that neither this act nor its prototype has ever had any such study from the executive department as ought to influence in the slightest degree the action of any judicial tribunal to which it is now presented. The rule being appealed to in

Merritt v. Cameron, 137 U. S. 542,

the court said:

> "A regulation of the department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in

> force for a long time. The cases cited go to that extent and no further."

And in

United States v. Tanner, 147 U. S. 661,

it was said:

> "It is only in cases of doubt that the construction given to an Act by the department charged with the duty of enforcing it becomes material."

Scarcely a case goes to the Supreme Court of the United States upon the construction of any act in relation to the disposition of the public domain that does not challenge the correctness of the interpretation put upon the law by the land department. It is rare that rulings so few in number or so inconclusive in character are available to the party endeavoring to sustain the action of the executive officers.

They are clearly wrong in this case and the decree should, accordingly, be affirmed.

THE ATTORNEY GENERAL OF THE UNITED STATES,
M. C. BURCH,
FRANK HALL,
FRED A. MAYNARD,
JAMES W. FREEMAN, and
WALSH & NOLAN,

Solicitors for Appellee.

T. J. WALSH,

Counsel for Appellee.

APPENDIX.

N. P. Ry. vs. John A. Rowand, April 27, 1907.

The Commissioner of the General Land Office:

Sir: Against the application by John A. Rowand for patent, to the Big Blackfoot, Golden Bar, and G and B lode mining claims, Surveys Nos. 7711, 7712, and 7713, respectively, Helena, Montana, land district, embracing portions of Sec. 29, T. 14 N., R. 9 W., the Northern Pacific Ry. Co. claiming that section under its grant, filed protest. June 30, 1906, the department concurring in your recommendation of March 9, 1906, directed that a hearing be ordered to determine the character of the land in controversy and the validity of the non-mineral classification thereof (made Oct. 31, 1899, approved by the department June 3rd, 1903) by the Commissioners under the Act of February 26, 1895 (28 Stat. 694.)

Hearing having been had accordingly, your office, under date of March 7, 1907, has submitted the record. Upon review of the evidence adduced, which your office briefly discusses and which it finds to establish the known mineral character of the land in question at the date of the classification and that that classification was not based upon a proper examination by the Commissioners, therefore fraudulent under the holding in Lamb et al vs. Northern Pacific R. R. Co. (29 L. D. 102) your office recommends that the approval of the classification be set aside as to those portions of the said section 29 covered by the mining claims above mentioned.

It is sufficient to say of the record that, in the opinion of the department, the evidence so submitted, which has been carefully examined, fully sustains the findings and conclusions reached by your office. The department therefore concurs in the recommendation and the approval of the classification is revoked accordingly.

The papers are herewith returned.

Very respectfully,

THOS. RYAN,

Acting Secretary.

1719

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA and THE NORTHWESTERN IMPROVEMENT COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF IN REPLY.

WILLIAM WALLACE, JR.,
Solicitor for Appellants,

C. W. BUNN and
CHARLES DONNELLY,
Of Counsel.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, THE ROCKY FORK COAL COMPANY OF MONTANA and THE NORTHWESTERN IMPROVEMENT COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF IN REPLY.

The argument of appellee in support of the decree appealed from proceeds almost entirely upon the theory that the Act of March 2, 1899, was a *grant* of lands from the government to the Northern Pacific Railroad Company, and that, being a public grant, it is to be construed strictly against the grantee and all doubts as to its meaning are to be resolved in favor of the government. This argument, as applied to the Act in question, is essentially fallacious and is utterly unsupported by authority.

The cases to which counsel appeal as supporting their contention are all cases in which the courts had under consideration Acts making direct grants to individuals or corporations, the Acts themselves operat-

ing to transfer the title to the thing granted and patents being issued simply as instruments of further assurance. These Acts were grants in the nature of *donations, made at the instance of the donees,* and there was present in each of them that circumstance, which, as said by Mr. Justice Day in the recent case of *Blair v. Chicago,* 201 U. S. 400, makes the rule of strict construction applicable, namely, that they were *"prepared by those interested in them."* The Act in question is not of this character. Its primary purpose is not that of granting a franchise or granting property of any nature whatsoever. Its object is to provide for the creation of a national park, and as an *incident* to this to fix the terms upon which the government is willing to acquire lands within the proposed park that are held in private ownership. The Act holds out a proposition, which, when accepted, gives rise to an ordinary contract to be interpreted like any other contract, not strictly against or favorably to either of the parties, but solely with a view to ascertaining what the parties meant and understood by it.

Counsel say, however, that the principle of strict construction is just as applicable in this kind of a case as in any case; that the mere fact that the offer held out by the Act and its acceptance by the railroad company constitute an ordinary contract, does not differentiate this case from the cases relied on in appellee's brief; that the grants actually made in those cases, as well as in this, gave rise to "contracts" upon their acceptance by the donee; and that the principle was applied in those cases notwithstanding there was a substantial consideration for the thing granted, mov-

ing from the grantee to the government. It is true that the grants involved in those cases, as well as the offer held out by the statute involved in the present case, gave rise to contracts; but it is altogether sophistical to argue that therefore the same principles of construction are to be applied to the statutes involved. Though the broad term "contract" is applicable alike in all the cases, the court cannot lose sight of the essential differences, as regards their history and circumstances, existing between the contract involved in the present case and the contract involved in the cases relied on by appellee: and *it is in those differences that the reason for the rule of strict construction applied in those cases is found.* Would counsel say that in *all* contracts made by the government, the obligation assumed by the government is to be construed strictly in its favor and against the party with whom the government contracts?

When, at the instance of a body of individuals, and by an act of their own framing, the corporate rights of railroad corporations are conferred upon those individuals, and lands are granted in aid of their enterprise, reasons exist for construing the grant strictly against them. But when, *upon its own initiative,* and by an Act with which the party addressed has nothing to do, the government says to an individual or corporation, "I will do this, if you will do that," and this proposition is accepted, the principles upon which the courts proceed in determining what "this" or "that" really is or means are precisely the same as if the contract were made between two private individuals; and no case can be found that asserts the contrary. Indeed, the supreme court of the United States, speak-

ing of ordinary contracts made by the United States, has said that "In the *construction* and enforcement of these contracts, the Court of Claims *is bound to apply the ordinary principles, which govern such contracts between individuals.*"

Smoot's Case, 15 Wallace, 36;
U. S. v. Smith, 94 U. S. 217.

It is said that in embodying in the Act of 1899, the exact language of the Act of 1892, Congress cannot be presumed to have adopted the construction which the Commissioner of the General Land Office had previously placed upon that language, because the Commissioner of the General Land Office is merely a subordinate executive officer, and his opinions are not printed; and counsel cite the case of *Dollar Savings Bank v. United States,* 19 Wall. 227, as authority for this proposition. In that case, the Commissioner of Internal Revenue had given a certain construction to language in a particular Act. Subsequently that language had been embodied by Congress in a later Act, and it was argued that Congress, in adopting the same language, had adopted the construction which the Commissioner of Internal Revenue had placed upon it. The supreme court refused to yield its assent to this proposition, *not,* however, upon the ground that the Commissioner of Internal Revenue was a subordinate executive officer or upon the ground that the opinion was not published, but upon the ground that the de-

cision actually rendered was one which the Commissioner of Internal Revenue *was not required by law to make,* and saying "There is, *therefore,* no presumption that his decisions were brought to the knowledge of Congress when the Act of 1870 was passed."

The very grounds upon which the supreme court proceeded in refusing to apply the principle in that case, are authority for its application in the case at bar.

Counsel's comment upon the *Bedal Case,* at pages 39 and 40 of their brief is deficient in both candor and fairness. That case was a direct and unequivocal decision of the Department, by and with the approval of one who is now a very eminent judge, that when lands selected under the Act of 1899 were shown to have been classified as non-mineral at the time of government survey, *no investigation as to the character of the land was warranted.* How can counsel say that such a decision is consistent with their theory of the meaning of the language in question? They say (page 24, appellee's brief) that when lands returned as non-mineral are selected "an inquiry as to whether the lands are in fact mineral or non-mineral is to be conducted by or under the direction of the Commissioner or the Secretary." This inquiry, they argue, is to be made, even though no protest whatsoever is filed against the selection; and, of course, if it is to be made where there is no protest at all, it must be made if there *is*

a protest, even though it be vague or indefinite in character. Yet here we find the Secretary, apprised directly that lands of which he is asked to approve the selection are of a class from which, according to counsel's contention, selection could not lawfully be made, refusing to order an investigation as to the character of the land; refusing, that is, to do in this case, what, according to counsel's contention, he was bound to do in every case, i. e., "conduct an inquiry as to whether the lands are in fact mineral." How, then, can it be argued that the *Bedal* decision is not an express rejection of appellee's views as to the meaning of the language in question, or that it is not a positive holding that when lands are once shown to have been classified as non-mineral, the question of their character in fact becomes unimportant?

The opinion in *St. Paul M. & M. R. Co.*, 34 Land Decisions, 211, is to the same effect. In that case certain lands had been examined by the Commission appointed under the Act of February 26, 1895 (28 Statutes at Large, 683) and found to be mineral in character. They were subsequently surveyed and classified as non-mineral at the time of the government survey. The Railroad Company, thereafter, sought to select them. Clearly here was a case where, if the Department had been taking that view of the law for which counsel contend, it would, in the language of counsel, have caused "an inquiry as to whether the lands were in fact mineral or non-mineral to have been conducted." The report of the Commissioners to the effect that the lands were mineral would certainly have suggested the propriety of determining what the facts actually were. But holding, as the Department had

uniformly held, that the classification of land as non-mineral in the government survey, gave the Railroad Company the right to select it, it became unimportant to determine whether the Mineral Commissioner was right or the Government Surveyor was right; and the decision of the subordinate land officials rejecting the Railroad Company's selection was reversed and those officials were directed to list the selection *"for approval with a view to the issue of patent."*

We print as an appendix hereto a decision of the Assistant Land Commissioner, dated June 3, 1908, as showing that the same construction was placed by the Department upon the Act right up to the time of the commencement of this suit.

WILLIAM WALLACE, JR.,
Solicitor for Appellants.
C. W. BUNN and
CHARLES DONNELLY,
Of Counsel.

APPENDIX.

DEPARTMENT OF THE INTERIOR.

"F"
W. K. M.
1908-88438. GENERAL LAND OFFICE.

WASHINGTON, D. C., June 3rd, 1908.

Address only the Commissioner of the General Land Office.

Returning lists St. Paul, Minn. and M. Railway Co. for allowance.

REGISTER AND RECEIVER,
Lewiston, Montana.

Sirs:

I have considered the appeal of the St. Paul, Minneapolis and Manitoba Railway Company from your rejection of its list No. 12, embracing NW¼ Sec. 10, T. 15 N., R. 12 E., for failure to file non-mineral affidavit.

The act of August 5, 1892 (27 Stat. 390), under which the company makes its selection, provides that it may select

> an equal quantity of non-mineral public lands so classified as non-mineral at the time of the actual Government survey which has been or shall be made.

Hence, if the report of the surveys does not class the lands as mineral they are held to be non-mineral and subject to selection—*St. Paul, Minneapolis & Manitoba Railway Company*, 34 L. D. 211.

In that case the land was classified and approved as mineral under the act of February 26, 1895, relating to the grant to the Northern Pacific Railway Company, but the Department ruled that this classification was overcome in so far as the right of selection given to

the St. Paul & Manitoba Railway Company was concerned by the subsequent survey and return of the Surveyor General of the land as non-mineral.

The returns of the survey show no indication as to the presence of mineral upon any portion of the section in question; the approved field notes of survey return the township as level, hills and rolling, some good bottom lands, and that "The lands are agricultural."

The action is therefore overruled and the lists are herewith returned *for your approval,* if no other objection thereto exists.

Very respectfully,

S. W. PROUDFIT,

Assistant Commissioner.

BOARD OF LAW REVIEW

By E. C. Finney.

E. R.

No. 1721

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

A. J. FOSTER and CITY OF SOUTH BEND, WASHINGTON (a Municipal Corporation),

Plaintiffs in Error,

vs.

EMANUEL BUSHONG,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

CHARLES E. MILLER, Esquire, South Bend, Washington, and A. J. ALLEN, Esquire, South Bend, Washington.

Attorneys for Plaintiffs in Error.

L. C. WHITNEY, Esquire, #427 California Bldg., Tacoma, Washington.

Attorney for Defendant in Error.

In the Circuit Court of the United States, Western District of Washington, Western Division.

No. 1338.

EMANUEL BUSHONG,

Plaintiff,

vs.

SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,

Defendants.

Complaint.

Plaintiff for his first cause of action says:

I.

That at all times mentioned herein he was and is a citizen of the State of Oregon.

II.

That at all the times mentioned herein the defendant South Bend was and is a municipal corporation organized and incorporated under the laws of the State of Washington and situated in said Judicial District.

III.

That at all times mentioned herein the defendant A. J. Foster was and is the duly appointed, qualified and acting marshal of said municipal corporation.

IV.

That on the 7th day of September, 1907, and prior thereto the plaintiff was engaged in the lawful business of travelling from place to place in the States of Washington and Oregon taking orders for the enlargement of pictures and for picture frames. His business consisting in soliciting and taking orders of different persons for pictures to be enlarged and for frames, forwarding the same to a dealer and manufacturer in the City of Chicago, State of Illinois, to be filled and returned to plaintiff to be delivered to his customers; that at said time he had a good business and trade established in said city of South Bend, had been visiting said city from time to time soliciting said orders for more than seven years all which was fully known to the defendants and each of them.

V.

That on said date, the defendants wrongfully and maliciously and without reasonable or probable cause wickedly intending to injure and damage the plaintiff, and injure and destroy his business in said city of South Bend and vicinity, filed a criminal complaint before M. D. Egbert, Police Justice of South Bend, Pacific County, State of Washington, charging the plaintiff with a crime, a copy of which criminal complaint is hereto attached and made a part hereof and marked Exhibit "A."

VI.

That thereafter on the same day said defendants

caused a warrant to issue out of said Police Justice's Court for his arrest and cause him to be arrested upon a criminal charge, and caused him to be taken into the custody of an officer and conducted along the public streets and public places in said city, and exposed him to the odium and disgrace of being exhibited as a criminal in the custody of an officer, a copy of which warrant is hereto attached and made a part hereof and marked Exhibit "B."

VII.

That thereafter on the 10th day of June, 1907, the defendants caused the plaintiff to be publicly tried for the pretended offense of violating the provisions of Ordinance No. 200 of said city and caused him to be convicted before said Police Justice for said pretended offense, and caused him to be adjudged by said Police Justice to pay a fine of $1.00 and costs in the sum of $17.35, and caused him to be committed to the City Jail of said city until said fine and costs were paid. That said ordinance was totally void, repugnant to and in violation of the provisions of the Constitution of the United States in relation to the regulations of Commerce. That said defendants at all times well knew said ordinance was void and that the plaintiff was not guilty of said pretended crime, or any crime, that they had no reasonable or probable cause for charging him with said crime or any crime but wilfully and maliciously and in pursuance of said collusion and conspiracy to injure and damage the plaintiff did all the acts in the premises, a copy of which said ordinance is hereto

attached and made a part hereof and marked Exhibit "C."

VIII.

That thereafter the defendants on the 25th day of September, 1907, caused the plaintiff to be incorporated in the City Jail of said city upon a mittimus issued on said judgment and kept him confined therein for a period of six days; that the plaintiff became sick and ill because of the exposure in said jail and lost three weeks time. That his time was reasonably worth the sum of $45.00 per week; that he suffered mental and physical pain, he was humiliated and disgraced, his business in said city and vicinity was ruined, his character and reputation injured and damaged among his patrons and was and is injured and damaged in the sum of $5,000.00.

The plaintiff for his second cause of action says:

I.

That he refers to the allegations contained in paragraphs 1, 2, and 3 of his first cause of action herein, and makes the same a part of this his second cause of action, and further alleges that at all the times mentioned herein said city maintained a filthy, unhealthy and unsanitary city prison, in which it confined all persons convicted of or charged with offenses, the same was all the place provided by said city for such purposes; that said prison was built of pieces of wood spiked and nailed together, the walls were solid, except a few small apertures protected by iron bars, and a door. The building was at all times unprovided with any drainage or sewerage, a hole in the floor was the only means

provided for the use of inmates to answer the calls of nature; that prior to the 25th day of September, 1907, said prison had long been in use by said city as a prison, for many years it had confined the common drunks, hoboes and Weary Willies there, as occasion required, as well as other offenders, the place had never been cleaned, renovated or disinfected.

The bedclothing was insufficient and reaking with filth, never having been washed, renovated or disinfected, but had the accretions of filth and dirt accumulated by the use of the same, and from the bodies of the numerous unfortunates confined there.

II.

That on the 25th day of September, 1907, the defendants, with full knowledge and notice of the conditions of said City Prison as aforesaid, wickedly intending to injure and damage the plaintiff, colluded and conspired together for that purpose, wrongfully and maliciously caused him to be placed in said City Prison and confined there for a period of six days.

III.

That prior to the time the plaintiff was so imprisoned he was at all times a strong, healthy man, entirely free from disease of any kind or character, that the confinement in said prison in its unhealthy condition and filthy surroundings, the exposure from want of proper clothing and from want of proper protection from the weather, the exposure to contagious disease and to the odors and stench arising from the accumulated filth and dirt and from the want of sewerage and drainage, the plaintiff

suffered very great mental and physical pain and agony; his nervous system received very great shock and injury; he became seriously sick and ill, and is so still sick and ill, he became and is affected with rheumatism and his health is permanently injured; that he was and is injured and damaged in the sum of $10,000.00.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of $5,000.00 on his first cause of action, and $10,000.00 on his second cause of action, and for his costs and expenditures herein.

L. C. WHITNEY,
Attorneys for Plaintiff.

Office and P. O. Address: Room ——, Tacoma, Wash.

State of Oregon,
County of Multnomah,—ss.

Emanuel Bushong, being first duly sworn, on oath deposes and says that he is the plaintiff named in the foregoing action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

EMANUEL BUSHONG.

Subscribed and sworn to before me this 13 day of January, A. D. 1907.

[Notarial Seal] ANDREW T. LEWIS,
Notary Public in and for the State of Oregon.

Exhibit "A" [to Complaint].

In the Police Court of South Bend, Pacific County, Washington.

Before M. D. Egbert, Esq., Police Justice.

STATE OF WASHINGTON

vs.

E. BUSHONG.

Criminal Complaint—For Soliciting Without License.

Before me, M. D. Egbert, Police Justice of South Bend, in said County, this day personally appeared A. J. Foster, who, being first duly sworn, on oath complains and says: That on the 7th day of June, A. D. 1907, at in South Bend, the County and State aforesaid, one John Doe, did then and there solicit and offer to sell goods and pictures without having first obtained a license therefor, contrary to the ordinance of the City of South Bend in such cases made and provided against the peace and dignity and laws of the State of Washington.

Wherefore, said complainant prays that the said E. Bushong may be arrested and dealt with according to law.

A. J. FOSTER.

Subscribed and sworn to before me this 7th day of June, A. D. 1907.

MARION D. EGBERT,
Police Justice.

Exhibit "B" [to Complaint].

In the Police Justice Court of South Bend, Pacific County, Washington.

STATE OF WASHINGTON

vs.

E. BUSHONG.

Warrant.

To the Marshal or any Policeman of the City of South Bend, Washington:

Greeting: Whereas A. J. Foster has this day complained in writing under oath to the undersigned, Police Justice in and for said city, that on the 7th day of June, 1907, at the city of South Bend, in said County and State, the crime of soliciting the sale of pictures without a license was committed, to wit, by ....., who then and there did solicit the sale of pictures, etc., without having first obtained a license therefor.

Therefore, in the name of the State of Washington, you are commended forthwith to apprehend the said E. Bushong and bring him before me to be dealt with according to law.

Given under my hand this 7th day of June, 1907.

MARION D. EGBERT,
Police Justice.

Exhibit "C" [to Complaint].

Ordinance No. 200.

An ordinance fixing the license fee to be collected for certain business, occupation and employments

for the purpose of regulation and revenue; and, repealing sections Nos. 5 and 6 of ordinance No. 180, passed on the 15th day of September, 1902, entitled "An ordinance to license certain business, occupations and employments for the purpose of regulation and revenue, and repealing ordinances Nos. 41 and 85 of the City of South Bend"; and substituting therefor the following sections.

The council of the City of South Bend do ordain as follows:

Section 1. That Sections 5 and 6 of Ordinance No. 180, entitled "An ordinance to license certain business occupations and employments for the purpose of regulation and revenue and repealing ordinances Nos. 41 and 85 of the City of South Bend", passed on the 15th day of September, 1902, be and the same is hereby repealed and declared to be of no effect.

Section 2. That hawkers shall pay a license of $10.00 per day. Any one who offers goods for sale by outcry or otherwise on any street, alley, public hall or vacant lot, who shall conduct business from stand or wagon shall be deemed a hawker under this ordinance.

Section 3. That any person who offers to sell goods, wares or merchandise or other commodities, and travels about from place to place within said city shall be regarded as a pedler and pay a license of $10.00 per day or for each fraction thereof.

This ordinance shall take effect and be in force five days after its passage and publication.

Passed by the City Council on the 21st day of September, 1903.

[Signed] JOHN H. DRISLER,
Mayor.
Attest: VAL HEATH,
City Clerk.
Approved WILLIAM H. GUDGEL,
Atty.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Jan. 14, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, for the Ninth Circuit, Western District of Washington, Southern Division.

EMANUEL BUSHONG,
Plaintiff,
vs.
SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,
Defendants.

Demurrer.

To the Hon. C. H. HANFORD, Judge of the Circuit Court, for the District of Washington.

The demurrer of South Bend, a municipal corporation, and A. J. Foster, defendants herein, to the complaint of Emanuel Bushong, respectfully shows:

I.

That enough does not appear upon the face of the complaint to show facts sufficient to constitute

a cause of action against the defendants above named.

A. J. ALLEN,

Attorney for the Defendants, South Bend, Pacific County, Washington.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Dated at South Bend, Washington, this 5th day of February, 1908.

A. J. ALLEN,

Attorney for Defendants.

Due personal service of the within demurrer, by copy, admitted this 4th day of February, A. D. 1908.

L. C. WHITNEY,

Attorney for Plaintiff.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Feb. 4, 1908. A. Reeves Ayres, Clerk. Sam'l. D. Bridges, Deputy."

In the Circuit Court of the United States, for the Western District of Washington, Western Division.

No. 1338.

EMANUEL BUSHONG,

Plaintiff,

vs.

SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,

Defendants.

Opinion [on Demurrer].

L. C. WHITNEY, for Plaintiff.

A. J. ALLEN, for Defendants.

WHITSON, District Judge.—Two causes of action are set out in the complaint, one for false imprisonment and the other for detaining the plaintiff while under arrest in an unsanitary jail. Defendants demur in that facts are not stated sufficient to constitute a cause of action.

A consideration of the cases cited and arguments made leads to the conclusion that the plaintiff cannot recover upon the first cause of action, at least as against the municipality. As to the second, I give my adherence to those authorities which hold that a municipal corporation cannot take refuge behind the public character of the duties imposed upon it where it maintains a filthy, unhealthy place of detention, and detains one in custody in such place with full knowledge of its condition, as alleged in the complaint, and thereby shield itself from resulting injuries.

Whether there could be a recovery as against the defendant Foster need not be decided, for the elimination of the defendant corporation as to that cause of action would necessarily eliminate the other defendant or subject the complaint to the charge of misjoinder or causes of action.

The demurrer, being directed to the complaint generally and not to the causes of action separately stated, must be overruled.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Mar. 30, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, Western District of Washington, Western Division.

No. 1338.

EMANUEL BUSHONG,

Plaintiff,

vs.

SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,

Defendants.

Order [Overruling Demurrer].

And now on this 24th day of February, A. D. 1908, this case coming on for hearing and trial on the demurrer of the defendants to the complaint herein, the plaintiff duly appearing by his attorney, L. C. Whitney, Esq., and the defendants duly appearing by their attorney A. J. Allen, Esq., said demurrer was duly submitted to the Court upon the records and files in said case and the statements of the counsel of the parties, the same was taken under advisement by the Court.

And now on this 6th day of April, A. D. 1908, the Court, being duly advised in the premises, orders and adjudges that said demurrer be, and the same is overruled and denied.

Signed this 6th day of April, A. D. 1908.

EDWARD WHITSON,

Judge.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Apr. 7, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."
"G. O. B. 279."

In the Circuit Court of the United States for the Western District of Washington, Western Division.

EMANUEL BUSHONG,

Plaintiff,

vs.

SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,

Defendants.

Separate Answer of City of South Bend.

1. Comes now the defendant, City of South Bend, by A. J. Allen, City Attorney, its attorney, and answering the complaint herein, separately and for itself, this defendant denies each and every allegation therein contained, as fully as if the same was denied paragraph by paragraph, excepting as to such matters as may be, hereby, hereinafter, expressly, admitted.

2. This defendant denies that the persons named in said complaint, to wit, M. D. Egbert, Police Justice, and A. J. Foster, City Marshal, were, in the matters set forth in said first count of caid complaint, the servants of this defendant City of South Bend, or acting in pursuance of their appointment and qualification as such, in the premises, but they

were the servants and officers of the said State of Washington, and, then and there, enforcing the public laws of said State; and further answering this defendant says that there is no requirement of law which renders it liable for the acts, omissions, or defaults of its officers in the enforcement of the public laws of this State.

3. And as to the second count, contained in said complaint, this defendant, City of South Bend, further answering, says, that during the whole time mentioned in said count, it had, possessed and maintained a common jail for the confinement of all persons charged with or convicted of violating its ordinances or any thereof; and said jail was constructed of healthful, resinous, native pine wood, secure, well ventilated, splendidly drained, cleanly in every way, and provided with mattress, blankets, a stove and an abundance of fuel, and this defendant avers that then and there, it used the utmost care in providing and maintaining a city jail that was cleanly, healthful, sanitary and equipped with all of the ordinary appliances necessary to the health comfort and well-being of its prisoners, and that it had no notice to the contrary.

4. And this defendant further answering says that it has not any knowledge sufficient to form a belief whether prior to said commitment the plaintiff was a strong, healthy man, entirely free from disease of any kind or character, or whether the plaintiff suffered very greatly, mental and physical pain and anguish, or whether plaintiff's nervous system received very great shock and injury, and

became seriously sick and ill, or whether plaintiff became seriously sick and ill, and is so still sick and ill, or whether the plaintiff became and is affected with rheumatism, and his health is permanently affected but this defendant denies that at the time of the confinement of the said plaintiff in said jail, that said building was not properly provided with drainage and sewerage, or that the same had never been cleaned, renovated or disinfected; it denies that the bedclothing was insufficient and reaking with filth, or that the same had never been washed or disinfected, or that it had accumulated filth and dirt by the use of the same from and by numerous prisoners confined therein; and it denies that the said jail was not in every way ordinarily health and comfortable.

And this defendant prays judgment in its favor in this action against the plaintiff for its costs and disbursements herein incurred and expended.

A. J. ALLEN,

City Attorney of South Bend, and Attorney for Defendant.

State of Washington,
County of Pacific,—ss.

A. J. Allen, being first duly sworn, according to law, upon his oath says, that he is the duly elected, qualified and acting City Attorney for the City of South Bend, that he makes this affidavit for said City of South Bend in that behalf, that he has read the within answer, knows the contents thereof and that the same is true as he verily believes.

A. J. ALLEN.

Subscribed and sworn to before me this 6th day of April, 1908.

[Notarial Seal] MARION D. EGBERT,
Notary Public for the State of Washington, Residing at South Bend.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Apr. 8, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States for the Western District of Washington, Western Division.

EMANUEL BUSHONG,

Plaintiff,

vs.

SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,

Defendants.

Separate Answer of A. J. Foster.

1. Comes now the defendant, A. J. Foster, by A. J. Allen, his attorney, and answering the complaint herein, separately for himself denies each and every allegation therein contained, as fully as if the same was denied by paragraph, excepting as to such matters as may be hereby hereinafter expressly admitted.

2. And for further answer to the first count of the complaint herein, this defendant, A. J. Foster, says there is no requirement of law which renders this defendant liable for any of the alleged acts,

omissions or defaults charged to him in said count of said complaint.

3. And for a further answer to the second count, contained in said complaint, this defendant, A. J. Foster, says that at the times mentioned in said complaint, he was the duly appointed, qualified and acting marshal of said defendant municipal corporation, South Bend, that on the said September 25th, 1907, this defendant A. J. Foster was required by a warrant of commitment, regularly and duly issued by the Police Justice of said defendant municipal corporation, The City of South Bend, commanding this defendant to arrest the plaintiff and to confine him in the jail of the said defendant, South Bend, reciting that the plaintiff had been duly convicted of violating one of the ordinances of the said defendant, South Bend, in soliciting and offering for sale goods and pictures without first having obtained a license therefor, and adjudged to pay a fine and costs and that the same had not been paid; that in pursuance of the command contained in said warrant of commitment, this defendant A. J. Foster, thereupon arrested the plaintiff and incarcerated him in said jail; that said jail was the place, and the only place, provided by the said defendant, South Bend, for the imprisonment of persons charged with, or convicted of, violating its ordinances, and that the same place was then and there, and during the imprisonment of said plaintiff, in a clean, healthful and sanitary condition, and provided with a stove, wood, kindlings, mattress and blankets, and everything necessary and requi-

site to the ordinary health and comfort of a prisoner and that during all the times that the plaintiff was imprisoned in said jail, the same was in a cleanly, healthy and sanitary condition, to a degree far beyond institutions of that character in cities of the class of the defendant South Bend.

4. And further answering, this defendant A. J. Foster, says, that if the plaintiff shall offer any evidence to sustain any part of his second count of his complaint, herein, he, this defendant, will show that at the time of his arrest and confinement of the plaintiff described in his said complaint, the plaintiff was grossly intoxicated, noisy and disturbing the peace, and that this defendant, A. J. Foster, then was a police officer, and in the discharge of his duty, he did no more to the plaintiff than by law he was required, and he had a right to do, and that if the plaintiff, in and during his said imprisonment, suffered any discomfort, or was in any way injured in his health, it was due solely, to his condition of intoxication, and failure to properly take advantage of and appropriate to himself the comforts and protection of health with which he was provided in said jail, during his said imprisonment.

And this defendant prays judgment in this action, against the plaintiff, for his costs in this behalf incurred.

A. J. ALLEN,
Attorney for A. J. Foster.

State of Washington,
County of Pacific,—ss.

A. J. Foster, being duly sworn, says, that he is the defendant named above, that he has read the

foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

A. J. FOSTER.

Subscribed and sworn to before me this 6th day of April, 1908.

[Notarial Seal] ALBERT J. ALLEN,
Notary Public.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Apr. 8, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, Western District of Washington, Western Division.

No. 1338.

EMANUEL BUSHONG,
Plaintiff,

vs.

SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,
Defendants.

Reply [to Answer of A. J. Foster].

And now comes the plaintiff and for reply to the answer of the defendant A. J. Foster filed herein, says:

I.

That he denies each and every allegation and averment contained in paragraph three of said answer from the word "and" in the 19th line to the end of said paragraph.

II.

That he denies each and every allegation and

averment contained in paragraph four of said answer.

Wherefore, he prays judgment as demanded in his complaint filed herein.

L. C. WHITNEY,
Atty. for Plff.

State of Washington,
Chehalis County,—ss.

Emanuel Bushong, being duly sworn, deposes and says that he is the plaintiff named in the foregoing entitled case; that he has heard the foregoing reply read, knows the contents thereof and believes the same to be true.

EMANUEL BUSHONG.

Subscribed and sworn to before me this 20th day of April, 1908.

[Notarial Seal] WILL LANNING,
Notary Public in and for State of Washington, Residing at Aberdeen, Wash.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Apr. 21, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, Western District of Washington, Western Division.

No. 1338.

EMANUEL BUSHONG,
Plaintiff,
vs.
SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,
Defendants.

Reply [to Answer of City of South Bend, etc.].

And now comes the plaintiff and for reply to the answer of the defendant South Bend, a municipal corporation filed herein, says:

I.

That he denies each and every allegation and averment contained in paragraph three of said answer.

Wherefore, he prays judgment as demanded in his complaint filed herein.

L. C. WHITNEY,
Atty. for Plaintiff.

State of Washington,
Chehalis County,—ss.

Emanuel Bushong, being duly sworn, deposes and says: That he is the plaintiff named in the above and foregoing entitled action; that he has heard the foregoing reply read, knows the contents thereof and believes the same to be true.

EMANUEL BUSHONG.

Subscribed and sworn to before me this 20th day of April, 1908.

[Notarial Seal] WILL LANNING,
Notary Public in and for the State of Washington,
Residing at Aberdeen, Wash.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Apr. 21, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the United States Circuit Court, for the Western District of Washington, Western Division.

EMANUEL BUSHONG,

Plaintiff,

vs.

SOUTH BEND and A. J. FOSTER,

Defendants.

Verdict.

We, the jury empaneled in the above-entitled case, find for the plaintiff and assess his damages at the sum of Two Hundred Dollars ($200.00).

E. J. CLOTHER,
Foreman.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Sep. 23, 1908. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, for the Western District of Washington, Western Division.

No. 1338.

EMANUEL BUSHONG,

Plaintiff,

vs.

SOUTH BEND (a Municipal Corporation), and A. J. FOSTER,

Defendants.

Judgment.

And now on this 22d day of September, A. D. 1908, this action came regularly on for trial, the plaintiff duly appearing by his atty., L. C. Whitney, Esq., and the defendants duly appearing by their attys., A. J. Allen, Esq., and Chas. E. Miller, Esq., a jury of twelve persons were regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendants were duly sworn and examined. After hearing the evidence, arguments of counsel, and the instruction of the Court, the jury retired to consider their verdict, and subsequently returned into court, and being called, answered their names and said they find a verdict in favor of the plaintiff in the sum of two hundred ($200.00) dollars.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff do have and recover from said defendants and each of them, the sum of two hundred ($200.00) dollars, with interest thereon at the rate of six per cent per annum from the date hereof until paid, together with his costs expended herein taxed at $.....

Judgment rendered this 29th day of September, 1908.

C. H. HANFORD,
Judge.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Sep. 29, 1908. A. Reeves

Ayres, Clerk. Sam'l D. Bridges, Deputy."
"J. & D. 81."

In the Circuit Court of the United States, for the Western District of Washington, Western Division.

EMANUEL BUSHONG,
Plaintiff,
vs.
A. J. FOSTER and the CITY OF SOUTH BEND,
Defendants.

Assignment of Errors.

Comes now the defendant, City of South Bend, by Chas. E. Miller, its attorney, and says that in the giving, rendering and entry of the judgment in the above-entitled action, there was manifest error in this:

I.

For that the Court erred in overruling and denying the demurrer of the defendant, City of South Bend, to the complaint of the plaintiff herein.

II.

For that the Court erred in not granting and sustaining the demurrer of the defendant, City of South Bend, to the complaint of the plaintiff herein, and rendering a judgment in favor of the defendant for its costs.

III.

For that the Court erred in rendering, giving and entering a judgment in favor of the plaintiff herein upon the said verdict of the jury.

CHAS. E. MILLER,
Attorney for Defendant, City of South Bend.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Mar. 20, 1909. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, for the Western District of Washington, Western Division.

EMANUEL BUSHONG,

Plaintiff,

vs.

A. J. FOSTER and the CITY OF SOUTH BEND,

Defendants.

Petition for Writ of Error.

The City of South Bend, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury, and the judgment rendered on September 25, 1908, therein, comes now, by Chas. E. Miller, its attorney, and petitions said Court for an order allowing said defendant, City of South Bend, to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided and also that an order be made fixing the security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said

writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

CHAS. E. MILLER,
Attorney for Defendant City of South Bend.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Mar. 20, 1909. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, for the Western District of Washington, Western Division.

EMANUEL BUSHONG,
Plaintiff,

vs.

A. J. FOSTER, and the CITY OF SOUTH BEND,
Defendants.

Order [Allowing Writ of Error, etc.].

Upon the motion of Chas. E. Miller, Esq., attorney for defendant, City of South Bend, and upon filing a petition for writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to be reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered and entered herein, and that the amount of bond on said writ of error be and herein is fixed at two hundred dollars, and if said bond is to operate as a supersedeas, then in the sum of five hundred dollars.

Done in open court this 20th day of March, A. D. 1909.

C. H. HANFORD,

United States District Judge and one of the United States Circuit Judges of the Circuit Court of Appeals for the Ninth Circuit, Presiding at the Circuit Court for the Western District of Washington.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Mar. 20, 1909. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

In the Circuit Court of the United States, for the Western District of Washington, Southern Division.

7586.

EMANUEL BUSHONG,

Plaintiff,

vs.

A. J. FOSTER and the CITY OF SOUTH BEND,

Defendants.

Bond [on Writ of Error].

Know All Men by These Presents: That we, City of South Bend, as principal, and The Title Guaranty & Surety Company, a Pennsylvania Corporation, as sureties, are held and firmly bound unto Emanuel Bushong in the full and just sum of Seven Hundred $700 Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of March, A. D. 1909.

Whereas, lately, at a session of the Circuit Court of the United States for the Western District of Washington, Western Division, a judgment was made and entered in a suit wherein Emanuel Bushong was plaintiff and A. J. Foster and the City of South Bend, were defendants, on the 25th day of September, 1908, in the sum of Two Hundred ($200) Dollars, and costs in the sum of ——— dollars;

And whereas, a writ of error has been duly sued out, and an order has been made on appeal in the sum of Two Hundred ($200) Dollars and the amount of the supersedeas bond at Five Hundred ($500) Dollars;

And whereas, the parties intend that said bond shall operate as a supersedeas bond;

Now, the condition of the above obligation is such that if the said City of South Bend, shall prosecute its writ of error, and answer all damages and costs, if it fail to make its appeal good, this obligation to be void; otherwise to remain in full force and effect.

CITY OF SOUTH BEND.
By W. P. CRESSY,
Mayor.

Attest: CHAS. H. MILLS,
City Clerk.

[Seal of City of South Bend]

THE TITLE GUARANTY & SURETY COMPANY.

[Seal of Surety Co.]

By HUSON & DEVER,
Agts. and Attorney in Fact.

The foregoing bond is hereby approved this 30th day of March, 1909.

C. H. HANFORD,
U. S. District Judge.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Mar. 30, 1909. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy."

[Clerk's Certificate to Transcript of Record.]

United States of America,
Ninth Judicial Circuit,
Western District of Washington,—ss.

In pursuance of the command of the Writ of Error herein, I, A. Reeves Ayres, Clerk of the United States Circuit Court for the Western District of Washington, herewith transmit a true copy of the record, assignments of error, and all proceedings in this case of Emanuel Bushong, plaintiff, against City of South Bend, a municipal corporation, and A. J. Foster, defendants, lately pending in the Circuit Court of the United States, for the Western District of Washington, under my hand and the seal of said court.

I do further certify that the costs of preparing and certifying said record amount to the sum of $43.80, which has been paid to me in full by the attorney for the plaintiff in error.

Attest: my official signature and the seal of the said Circuit Court, at the City of Tacoma, this twenty-ninth day of April, A. D. 1909.

[Seal] A. REEVES AYRES,
Clerk.
By Sam'l D. Bridges,
Deputy.

[Writ of Error.]

In the United States Circuit Court, for the Western District of Washington, Western Division.

A. J. FOSTER and CITY OF SOUTH BEND, WASHINGTON,
Plaintiffs in Error,
vs.
EMANUEL BUSHONG,
Defendant in Error.

United States of America,
Ninth Judicial Circuit,
Western District of Washington,—ss.

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Emanuel Bushong, plaintiff, and A. J. Foster and City of South Bend, defendants, a manifest error hath happened to the great damage of the said A. J. Foster and City of South Bend, defendants, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected,

and full and speedy justice done to the parties aforesaid in this behalf, do command you, if said judgment be therein given, that then under your seal, distinctly and openly, you send the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in said circuit, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States of America, this 30th day of March, A. D. 1909.

[Seal] Attest: A. REEVES AYRES,
Clerk.
By Sam'l D. Bridges,
Deputy.

[Endorsed]: No. 1338. In the Circuit Court of the United States, for the Western District of Washington. A. J. Foster and City of South Bend, Plaintiffs in Error, vs. Emanuel Bushong, Defendant in Error. Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Mar. 30, 1909. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy.

[Citation.]

In the United States Circuit Court for the Western District of Washington, Western Division.

No. 1338.

A. J. FOSTER and CITY OF SOUTH BEND, WASHINGTON,

Plaintiffs in Error,

vs.

EMANUEL BUSHONG,

Defendant in Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America, to Emanuel Bushing, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, on the 30th day of April, A. D. 1909, pursuant to a Writ of Error filed in the Clerk's office of the United States Circuit Court for the Western District of Washington, Western Division, wherein A. J. Foster, and City of South Bend, Washington, are Plaintiffs in Error, and Emanuel Bushong is the Defendant in Error, to show cause cause, if any there be, why the judgment rendered against said Plaintiffs in Error, as in the Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 30th day of

March, A. D. 1909, and the year of our Independence one hundred thirty-third.

[Seal] C. H. HANFORD,
U. S. District Judge, Presiding in said Circuit Court.

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Emanuel Bushong, said Defendant in Error, by handing to and leaving a true and correct copy thereof with L. C. Whitney as Attorney for Defendant in Error, personally at Tacoma, in said District on the 30th day of March, A. D. 1909.

C. B. HOPKINS,
U. S. Marshal.
By J. S. Davisson,
Deputy.

Marshal's fees $2.06.

[Endorsed]: No. 1338. In the Circuit Court of the United States, for the Western District of Washington. A. J. Foster and City of South Bend, Plaintiffs in Error, vs. Emanuel Bushong, Defendant in Error. Citation. Filed U. S. Circuit Court, Western District of Washington. Apr. 2, 1909. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy.

U. S. Marshal's Civil Docket No. 2652.

[Order Extending Time to File Return to Writ of Error.]

In the Circuit Court of Appeals, for the Ninth Judicial Circuit.

A. J. FOSTER and CITY OF SOUTH BEND,
Plaintiffs in Error,

vs.

EMANUEL BUSHONG,
Defendant in Error.

For good cause shown,

It is ordered that the time in which the Clerk may file his return on the Writ of Error herein in this Court be, and the same is hereby, extended up to and including the first day of June, A. D. 1909.

Dated April 27, 1909.

C. H. HANFORD,
Judge.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Apr. 30, 1909. A. Reeves Ayres, Clerk. Sam'l D. Bridges, Deputy.

[Endorsed]: No. 1721. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Foster and City of South Bend, Washington, a Municipal Corporation, Plaintiffs in Error, vs. Emanuel Bushong, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division.

Filed May 25, 1909.

F. D. MONCKTON,
Clerk.

No. 1721

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

A. J. FOSTER and CITY OF SOUTH BEND, WASHINGTON (a Municipal Corporation),
Plaintiffs in Error,

vs.

EMANUEL BUSHONG,
Defendant in Error.

Brief of Defendant in Error on Motion to Dismiss

HUDSON & HOLT, and L. C. WHITNEY,
Attorneys for Defendant in Error.

The Bell Press, Printers, Tacoma

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

A. J. Foster and City of South Bend, Washington (a Municipal Corporation), *Plaintiffs in Error,* vs. Emanuel Bushong, *Defendant in Error.*	No. 1721.

Brief of Defendant in Error on Motion to Dismiss

POINTS AND AUTHORITIES.

I.

The motion is based on the grounds that this Court has no jurisdiction, for the reason that the writ of error in this case was not signed and filed in the court that

tried the case within six months after the judgment was entered therein.

II.

A writ of error to this Court must be brought within six months after the judgment sought to be reviewed was entered.

Act of Congress, March 3rd, 1891, Sec. II, 26 Stat. 826.

III.

A writ of error is brought by filing it in the court that tried the case; that is the essential thing to remove the proceeding to the court of review.

Scarborough vs. Pargoud, 108 U. S., 568, 27 L. ed. 824.

Creit Co. vs. Arkansas, etc., Ry., 128 U. S., 261, 32, L. ed. 450.

U. S. vs. Baxter, 51 Fed. 624.

IV.

The writ of error in this case was signed and filed on the 30th day of March, 1909 (see transcript, page 32); the judgment was entered in the trial court September 29th, 1908 (see transcript, page 24); this is one day too late to give this Court jurisdiction in the matter.

See cases above cited.

City of Waxhachie vs. Coler, 92 Fed. 284.
Colter vs. Railroad, 61 Fed. 747.
Rutan vs. Johnson, 130 Fed. 109.
White et al. vs. Bank, 71 Fed. 97.
U. P. Ry. Co. vs. C. E. Ry. Co., 54 Fed 22.

The provision in the act relating to the time of appeal, or for suing out a writ of error, is strictly construed; six months means six calendar months; the time expires on the corresponding day in the sixth month after date of the entry of the judgment.

Johnston vs. Myers, 54 Fed. 417.

Born et al. vs. Schneider et al., 128 Fed. 179.

Respectfully submitted,

HUDSON & HOLT, and L. C. WHITNEY,

Attorneys for Defendant in Error.

No. 1722

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BEN BLANCHARD and THE HOWELL MINING COMPANY, Stockholders of THE AMERICAN COPPER COMPANY,

Petitioners,

vs.

G. W. AMMONS, BRISLEY DRUG COMPANY et al., Creditors of THE AMERICAN COPPER COMPANY, Bankrupt,

Respondents.

In the Matter of THE AMERICAN COPPER COMPANY, Bankrupt.

PETITION FOR REVISION.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898, to Revise in Matter of Law the Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Notice of Filing of Petition for Review, etc.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY.

From the District Court of the Fourth Judicial District of Arizona.

In the Matter of the AMERICAN COPPER COMPANY, Bankrupt.

In re Petition for Review of Ben Blanchard and Howell Mining Company, Stockholders of Said American Copper Company.

To Hawkins & Ross, Attorneys for G. W. Ammons, Brisley Drug Company et al., Creditors of the Above-named Bankrupt.

You are hereby notified that on the 7th day of June, A. D. 1909, we will file in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, a petition for review in the above-entitled cause, a copy of which petition is hereto attached as part of this notice, and we will then ask to have the case docketed, and the necessary order made therein to have such case set down for hearing.

Dated Prescott, Arizona, May 7th, 1909.

E. S. CLARK,
ROBT. E. MORRISON,
Attorneys for Petitioners.

We hereby accept service of the above notice this 7th day of May, A. D. 1909.

JNO. J. HAWKINS and
JOHN M. ROSS,

Attorneys for G. W. Ammons, Brisley Drug Co. et al., Creditors of Said Bankrupt.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY.

From the District Court of the Fourth Judicial District of Arizona.

In the Matter of the AMERICAN COPPER COMPANY, Bankrupt.

In re the Petition of Ben Blanchard and Howell Mining Company, Petitioning Stockholders.

Petition for Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of Ben Blanchard and Howell Mining Company respectfully shows unto the Court:

First: That on the 25th day of January, 1905, a petition in involuntary bankruptcy was filed herein praying that the American Copper Company be declared a bankrupt, a copy of which petition is hereto attached, marked Exhibit "A";

Second: That thereafter proper service was had upon the American Copper Company, and on the 7th day of February, 1905, an order adjudicating said company a bankrupt was duly entered, a copy of which order of adjudication is hereto attached,

marked Exhibit "B"; no answer was filed and no default was entered herein;

Third: That on the 25th day of March, 1905, your petitioners presented a petition unto the Honorable Richard E. Sloan, Judge of the District Court of the Fourth Judicial District of the Territory of Arizona, having and exercising the powers and jurisdiction of a Court of Bankruptcy under the laws of the United States, a copy of which petition is hereto attached and marked Exhibit "C";

Fourth: That on the 25th day of March, 1905, an order was entered by said Court directing the creditors of the bankrupt to show cause why the prayer of said petitioners should not be granted;

Fifth: That on the 24th day of May, 1905, the said creditors of said bankrupt, by their counsel, Hawkins & Ross, filed a demurrer to said petition, a true copy of which is hereto attached and marked Exhibit "D"; and also on said day said creditors filed their Motion to Strike, copy of which is attached hereto and marked Exhibit "Da"; no other persons appeared in opposition thereto; and said demurrer and motion were argued by counsel and submitted to the Court for decision;

Sixth: That on the 27th day of April, 1909, the Honorable Richard E. Sloan, Judge as aforesaid, made and signed an order and judgment denying your petitioners' application and petition which was duly filed in the office of the Clerk of said court, a copy of which order and judgment is hereto attached marked Exhibit "E," said matter having been theretofore fully argued before said Court, and that a copy of the de-

cision of said Court referred to in said Exhibit "E" is hereto attached and marked Exhibit "F";

Seventh: Your petitioners charge the fact to be that said District Court erred in denying your petitioners' application and petition, and your petitioners are aggrieved thereby, and therefore pray this Honorable Court to review and reverse the decision of said Court below, for the following reasons, to wit:

1. Because said order is contrary to law.

2. Because the Court, by his findings herein, found that the trust deed referred to as the ground of bankruptcy in the petition for involuntary bankruptcy herein, was not a general assignment for the benefit of creditors, thereby finding that said Bankruptcy Court had no jurisdiction to enter the order of adjudication herein.

3. The Court erred in denying said petitioners' application, for the reason that the said Court found as a fact that said alleged bankrupt was at the time of the institution of these proceedings insolvent; the Court not having granted these petitioners the right to introduce testimony in support of their allegations in their petition that said American Copper Company was solvent at the date of the filing of the petition in bankruptcy herein.

4. For the reason that the Bankruptcy Court, in denying your petitioners' application, decided this case upon the merits without granting to the petitioners herein the right of a trial and the presentation of evidence in support of their petition.

5. For the reason that the Court, having found that the trust deed heretofore mentioned was not a general assignment for the benefit of creditors, and that being the only act of bankruptcy described in the petition in bankruptcy, the Court should have granted a trial to your petitioning stockholders and permitted them to answer the petition in bankruptcy as filed in this cause.

6. For the reason that the Court had no right, in considering this petition, to find that the American Copper Company was insolvent at the date of the institution of the proceedings herein, but should have granted these petitioning stockholders a hearing upon the merits upon this subject.

7. For the reason that the Court in Bankruptcy, having found that the defects in the petition in involuntary bankruptcy could be cured by amendment, had no right to find as it did that the result on a hearing of such amendment would be the same, because the American Copper Company has never in these proceedings had an opportunity to introduce a defense upon a charge of insolvency, the allegation in the petition in involuntary bankruptcy that the bankrupt was insolvent being immaterial, for the reason that the act of bankruptcy charged was that of a general assignment for the benefit of creditors.

8. For the reason that the American Copper Company, the alleged bankrupt, has been denied the right of a trial by the Court or by a jury, of the question of its solvency at the time of the institution of these proceedings.

9. The Court erred in holding as follows:

"While, therefore, the specific act of bankruptcy complained of by the petitioning creditors is not shown to have been committed, it does appear that another act of bankruptcy was, by said conveyance, committed by the corporation. The variance is one which may be cured by amendment. The showing, therefore, appears to the Court to be insufficient for the vacation of the default and the setting aside of the judgment of adjudication, inasmuch as it would be unavailing to the petitioners, Blanchard and the Howell Mining Company, for the reason that by an amendment made to the creditor's petition another judgment of like effect to the former would be entered upon the hearing of the cause."

Because a default was suffered by the alleged bankrupt herein upon the charge that an act of bankruptcy had been committed and an order of adjudication was entered herein pro confesso. But it does not appear from the record that, had insolvency been presented as an issue, a default would have been allowed or suffered;

That at the time the order denying these petitioners' application herein was made such an amendment as is suggested by the Court would have presented an entirely new and vital issue to be tried, to wit: the solvency of the alleged bankrupt at the date of the filing of the petition in involuntary bankruptcy.

10. For the reason that the Bankruptcy Court had not right to find that the alleged bankrupt was insolvent at the date of the institution of these proceed-

ings, because the alleged bankrupt has never in these proceedings had an opportunity to be heard in its own defense on the question of solvency.

11. For the reason that the record in this case does not show that the alleged bankrupt was insolvent at the date of the institution of these proceedings.

12. Because the petition in involuntary bankruptcy herein did not present for consideration or decision the question of the solvency of the American Copper Company, but only the question of whether or not the trust deed described in said last-mentioned petition was a general assignment for the benefit of creditors, and any amendment of said last-mentioned petition alleging that said trust deed was a preference would present a new cause of action which the American Copper Company would have the right to defend.

13. Because the order of adjudication herein was not supported by the allegations of the petition in involuntary bankruptcy.

14. Because the finding of the Bankruptcy Court in denying the petitioning stockholders' application is not supported by the record or any evidence in this cause.

15. Because the order herein complained of overruled the demurrer herein and thereupon an issue of fact was presented which should have been set down for hearing.

16. Because the Bankruptcy Court having found that the act of bankruptcy alleged in the petition in involuntary bankruptcy had not been committed, it

was clearly the duty of the Bankruptcy Court to grant the prayer of the petitioning stockholders and set aside the order of adjudication of the alleged bankrupt heretofore entered herein; and if the petitioning creditors for bankruptcy amend their petition herein, that the bankrupt or these petitioning stockholders be permitted to answer the same.

Eighth: No proof was taken in connection with the determination by the Honorable Richard E. Sloan, and the entire proceedings upon which said judgment and order is grounded appear in the exhibits hereto attached, which said exhibits are made a part of this petition, and your petitioners pray that the same be considered as if they were set forth at length herein;

Ninth: Your petitioners therefore pray that such order of the District Court be set aside and held for naught, and that by the order of this Court it be decreed that you petitioners have a right to have an issue found and the truth of the averments contained in their said petition determined according to the rules and procedure applicable in such cases, and that your petitioners be given such other and further relief as shall be proper.

E. S. CLARK,

ROBT. E. MORRISON,

Attorneys for Ben Blanchard and Howell Mining Company, Petitioning Stockholders of Said American Copper Company.

Arizona Territory,
County of Yavapai,—ss.

Allen Hill, being first duly sworn, deposes and says:

That his postoffice address is Prescott, Yavapai County, Arizona Territory; that he makes this affidavit as the agent of the petitioners above named, for the reason that said petitioners are absent from the Territory of Arizona, and does hereby make solemn oath that the statements therein contained are true to the best of his knowledge, information and belief.

ALLEN HILL.

Subscribed and sworn to before me this 7th day of May, 1909.

My commission expires Feb. 4, 1911.

[Seal] J. E. RUSSELL,
Notary Public.

[Exhibit "A" to Petition for Review.]

Creditors' Petition.

To the Honorable RICHARD E. SLOAN, Judge of the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy, Under the Laws of the United States:

The petition of THE PRESCOTT ELECTRIC COMPANY, a corporation organized and existing under the laws of the Territory of Arizona and en-

gaged in the transaction of business in the County of Yavapai, in said Territory; of R. H. BURMISTER & SONS COMPANY, a corporation organized and existing under the laws of said Territory and engaged in the transaction of business at Prescott, Yavapai County, in said Territory; of C. R. MARTINDELL and E. J. F. HORNE, doing business as a copartnership under the firm name and style of MARTINDELL, HORNE & COMPANY, at Prescott, in said County and Territory; and of A. J. HEAD, a resident of Prescott, in said County and Territory, and there engaged in the transaction of business, respectfully shows:

That THE AMERICAN COPPER COMPANY is a corporation duly organized and existing under the laws of the Territory of Arizona and for more than one year last past has had its principal place of business at Blanchard, in the County of Yavapai, in the Territory and District aforesaid, being there engaged in a general mining and ore reduction business, and owes debts to the amount of One Thousand Dollars ($1000.00) or over;

That your petitioners are creditors of said THE AMERICAN COPPER COMPANY, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of more than Five Hundred Dollars ($500.00); that the nature and amount of your petitioners' claims are as follows:

That said THE AMERICAN COPPER COMPANY is indebted to your petitioner, THE PRESCOTT ELECTRIC COMPANY, for telephone ser-

vice rendered by it to said THE AMERICAN COPPER COMPANY, at its special instance and request, and for goods, wares and merchandise sold and delivered by said petitioner to said THE AMERICAN COPPER COMPANY, at its special instance and request, in the sum of Sixty-eight and 98/100 Dollars ($68.98), over and above all just counterclaims or offsets; that no part of said indebtedness is secured, and that said telephone service, goods, wares and merchandise were furnished as aforesaid during the year 1904;

That said THE AMERICAN COPPER COMPANY is indebted to your petitioner, R. H. BURMISTER & SONS COMPANY, for goods, wares and merchandise sold and delivered by said petitioner to said THE AMERICAN COPPER COMPANY, at its special instance and request, in the sum of One Hundred and Ninety-seven and 28/100 Dollars ($197.28), said goods, wares and merchandise having been sold and delivered as aforesaid during the year 1904; that said amount is due over and above all just counterclaims or offsets, and that no part of same is secured.

That said THE AMERICAN COPPER COMPANY is indebted to your petitioners, MARTINDELL, HORNE & COMPANY, in the sum of One Hundred and Forty-one and 2/100 Dollars ($141.02), said sum being due on account of premiums upon insurance furnished and written by your said petitioners for said THE AMERICAN COPPER COM-

PANY, at its special instance and request, between the 1st day of November, A. D. 1904, and the 31st day of December, A. D. 1904; that said amount is due your petitioners over and above all just counterclaims or offsets and that no part of same is secured.

That said THE AMERICAN COPPER COMPANY is indebted to your petitioner, A. J. HEAD, in the sum of One Hundred and Forty-seven and 4/100 Dollars ($147.04), for goods, wares and merchandise sold and delivered by said petitioner to said THE AMERICAN COPPER COMPANY on and between the 26th day of November, A. D. 1904, and the 21st day of December, A. D. 1904, at said THE AMERICAN COPPER COMPANY'S special instance and request; that said amount is due your petitioner over and above all just counterclaims and offsets, and that no part of same is secured.

Your petitioners further represent that said THE AMERICAN COPPER COMPANY is insolvent, and that within four months next preceding the date of this petition, said THE AMERICAN COPPER COMPANY committed an act of bankruptcy, in that it did heretofore, to wit, on the 4th day of November, A. D. 1904, by a certain trust deed, made a general assignment of all of its property to one R. M. Hockaday, in trust for the benefit of its creditors.

WHEREFORE, your petitioners pray that service of this petition, with a subpoena, be made upon said THE AMERICAN COPPER COMPANY, as provided in the acts of Congress relating to bankruptcy,

and that it be adjudged a bankrupt within the purview of said acts.

THE PRESCOTT ELECTRIC CO.,
By F. L. WRIGHT, Pres.
R. H. BURMISTER & SONS CO.,
R. H. BURMISTER, Prest.
MARTINDELL, HORNE & CO.,
By E. J. F. HORNE.
A. J. HEAD.
HAWKINS & ROSS,
Attorneys.

United States of America,
Fourth Judicial District of the
Territory of Arizona,—ss.

F. L. Wright, being President of the Prescott Electric Company, one of the petitioners above named, hereby make solemn oath on behalf of said petitioner, that the statements contained in the foregoing petition subscribed by said petitioner are within his knowledge and are true.

F. L. WRIGHT.

Before me, John M. Ross, this 24th day of January, A. D. 1905.

[Notarial Seal] JOHN M. ROSS,
Notary Public.

My commission expires April 20, 1907.

United States of America,
Fourth Judicial District of the
Territory of Arizona,—ss.

R. H. Burmister, being President of R. H. Burmister & Sons Company, one of the petitioners above

named, hereby makes solemn oath on behalf of said petitioned, that the statements contained in the foregoing petition subscribed by said petitioner are within his knowledge and are true.

R. H. BURMISTER & SONS CO.
R. H. BURMISTER,
Prest.

Before me, John M. Ross, this 24th day of January, A. D. 1905.

[Notarial Seal] JOHN M. ROSS,
Notary Public.

My commission expires April 20, 1907.

United States of America,
Fourth Judicial District of the
Territory of Arizona,—ss.

E. J. F. Horne, named in the foregoing petition as a member of the therein-named petitioner, Martindell, Horne & Company, hereby makes solemn oath on behalf of said petitioner, that the statements contained in the foregoing petition subscribed by said petitioner are within his knowledge and are true.

E. J. F. HORNE.

Before me, John M. Ross, this 24th day of January, A. D. 1905.

[Notarial Seal] JOHN M. ROSS,
Notary Public.

My commission expires April 20, 1907.

United States of America,
Fourth Judicial District of the
Territory of Arizona,—ss.

A. J. Head, one of the petitioners above named, hereby makes solemn oath that the statements contained in the foregoing petition subscribed by him are true.

A. J. HEAD.

Before me, John M. Ross, this 24th day of January, A. D. 1905.

[Notarial Seal] JOHN M. ROSS,
Notary Public.

My commission expires April 20, 1907.

[Endorsed]: Filed 9:30 A. M. Jany. 25, '05. J. M. Watts, Clerk.

[Exhibit "B" to Petition for Review.]

Creditors' Petition [that American Copper Co. be Adjudged Bankrupt.]

In the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy Under the Laws of the United States.

IN BANKRUPTCY.

In the Matter of THE AMERICAN COPPER COMPANY,

Bankrupt.

Adjudication of Bankruptcy.

At Prescott, in said District, on the 7th day of February, A. D. 1905, before the Honorable Richard E. Sloan, Judge of said court in bankruptcy, the petition of The Prescott Electric Company, R. H. Burmister & Sons Company, Martindell, Horne & Company, and A. J. Head, that The American Copper Company be adjudged bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said The American Copper Company is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable RICHARD E. SLOAN, Judge of said court, and the seal thereof, at Prescott, in said District, on the 7th day of February, A. D. 1905.

[Seal] J. M. WATTS,
Clerk.

[Endorsed]: Filed Feb. 7, 1905.

[Exhibit "C" to Petition for Review.]

[Petition of Benjamin Blanchard et al. for Setting Aside of Default, etc.].

In the District Court of the United States for the Fourth District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy Under the Laws of the United States.

IN BANKRUPTCY.

In the Matter of THE AMERICAN COPPER COMPANY,
Bankrupt.

To the Honorable R. E. SLOAN, Judge of Said Court:

The petition of Benjamin Blanchard and of Howell Mining Company, a corporation, respectfully shows to this Court:

I.

That Howell Mining Company is a corporation, duly created, organized and existing under the laws of the Territory of Arizona, and authorized and empowered to own and hold the stock hereinafter alleged; and that said Benjamin Blanchard is a resident of the City of Kansas City, State of Missouri.

II.

That American Copper Company is a corporation, duly created, organized and existing under the laws of the Territory of Arizona, having an authorized capital stock of $5,000,000, divided into 5,000,000 shares of the par value of one dollar each.

III.

That your petitioner, said Benjamin Blanchard, is the owner and holder of, and has standing on the stock-books of said American Copper Company, 31,000 shares of its said capital stock, and that your petitioner, Howell Mining Company, is the owner and holder of, and has standing on the stock-books of said American Copper Company 2,000,000 shares of its said capital stock.

IV.

That heretofore, viz.: on the 25th day of January, 1905, an involuntary petition in bankruptcy was filed herein by the Prescott Electric Company, R. H. Burmister & Sons Company, Martindell, Horn &

Co. and A. J. Head, petitioning creditors therein, against said American Copper Company, a corporation as aforesaid, praying that said corporation be adjudicated a bankrupt, and alleging that said corporation had, prior to the filing of said petition, committed certain acts of bankruptcy in said petition set forth and alleged; and that thereupon such proceedings were had and taken herein that an order was duly made or given herein and by this Court, on or about the 7th day of February, 1905, adjudicating and decreeing said American Copper Company, a corporation, a bankrupt.

V.

That at or prior to the time of the filing of said petition, said American Copper Company, the alleged bankrupt, was, ever since has been and now is solvent, and that the petition herein praying for an adjudication of bankruptcy against the American Copper Company, the respondent, does not allege or set forth the commission or permission of any act or acts of bankruptcy by respondent; that the transfer, conveyance, or instrument in writing alleged in said petition to have been made and executed by the respondent, and charged in said petition as an act of bankruptcy, was not and is not a general assignment for the benefit of a creditor or creditors. That said respondent in or by said instrument, or otherwise, or at any time or at all, has not conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of its property with intent to hinder, delay, or defraud its creditors, or any of them. That said respondent in or by said in-

strument or otherwise, or at any time or at all, has not transferred, while insolvent, any portion of its property to one or more of its creditors with intent to prefer such creditor or creditors over its other creditors. That said respondent has not at any time suffered or permitted any creditor to obtain a preference through legal proceedings. That said respondent has never at any time made a general assignment for the benefit of its creditors, and has not applied for a receiver or trustee for its property, and that no receiver or trustee has ever been put in charge of its property under the laws of a state, territory or of the United States, except in this proceeding. That said respondent has never admitted in writing or otherwise its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

VI.

That a majority of the directors and the President and Secretary of respondent, in pursuance of a fraudulent conspiracy, caused the petitioning creditors to join in and cause to be filed herein said involuntary petition in bankruptcy against said respondent, and that said petition was caused to be filed by them and said bankruptcy proceedings against respondent were caused to be instituted by them by said persons fraudulently, and without just or sufficient cause therefor, and in pursuance of and in order to carry out a wrongful, fraudulent and collusive scheme and agreement theretofore made and entered into between the officers and a majority of the directors of said corporation, the alleged bankrupt,

and for the purpose of wrongfully and fraudulently harassing and annoying said alleged bankrupt, and acquiring its property and obtaining control and possession thereof, to the injury of your petitioners and other stockholders of the respondent corporation, all of which is more fully set forth in the affidavit of Benjamin Blanchard, one of your petitioners, attached hereto and marked Exhibit "A," and which said affidavit is hereby made a part hereof.

Wherefore, your petitioners, in their own behalf, and in behalf of any other stockholder or stockholders of said respondent, American Copper Company, who may hereafter join them or intervene herein, ask and pray:

That an order be made herein as follows:

1st. Vacating and setting aside the default and the order entering the default of American Copper Company;

2d. Vacating and setting aside the order or judgment heretofore given or made herein declaring and adjudicating American Copper Company a bankrupt, and all subsequent orders relating thereto and proceedings had herein;

3d. Vacating and setting aside any order heretofore made herein for the sale of the property of said alleged bankrupt or for a hearing thereon;

4th. Permitting said petitioning stockholders, and such other stockholder or stockholders of said American Copper Company, as may hereafter apply for leave to do so, to intervene herein, and to plead to said involuntary bankruptcy petition, and to file

herein their answer and objection, or answers or objections to said petition and to the prayer of said petition, and to contest the same.

That an order of this Honorable Court and under the seal of this Court, together with a subpoena, issue herein, directing and requiring the creditors of American Copper Company, who joined in and caused to be filed said involuntary bankruptcy proceedings against the respondent, the American Copper Company, the respondent corporation, and any and all persons interested herein as creditors, stockholders or otherwise, to appear at and before this Court, as a court of bankruptcy, to be holden at the courthouse, in Prescott, Yavapai County, Arizona, in the District aforesaid, at a time to be fixed in or by said order by this Court or a Judge thereof, then and there to show cause, if any there be, why the prayer of this petition should not be granted.

And your petitioners further pray that they may be permitted upon the hearing or trial of their said petition to produce witnesses in court, examine them at such hearing or trial, and use their testimony thereat and therein, and to present at and in said hearing or trial such further or additional affidavits or proof as they may be advised, in support of their said petition and in proof of the allegations contained therein; and that in the meantime and until the final disposition of their said petition and matters here presented, and the further order of this Court, Thomas C. Job, Referee in Bankrupty herein, and Rollins M. Hockaday, Trustee in Bankruptcy herein, be enjoined and restrained from in any way

proceeding with the sale of the property of said alleged bankrupt, or in any petition, proceeding or proceedings, filed, had or pending in connection with such sale or to obtain an order for such sale.

Dated, City of New York, State of New York, March 28th, 1905.

ROBT. E. MORRISON,

Attorney for Petitioners, Residing at Prescott, Arizona.

THOMAS FITCH,

Attorney for Petitioners, Residing at 42 Broadway, New York City.

FRANCIS FITCH,

Attorney for Petitioners, Residing at 42 Broadway, New York City.

State of New York,
County of New York,—ss.

Benjamin Blanchard, being first duly sworn, deposes and says, that he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

BEN. BLANCHARD.

Subscribed and sworn to before me this 18th day of March, 1905.

[Seal] HENRY I. NEWELL,
Notary Public, Queens Co., N. Y.
Certft. filed in N. Y. County.

Certft. filed in N. Y. County.

[Affidavit, Dated March 18, 1905, of Benjamin Blanchard.]

In the District Court of the United States for the Fourth Judicial District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy Under the Laws of the United States.

IN BANKRUPTCY.

In the Matter of THE AMERICAN COPPER COMPANY,

Bankrupt.

State of New York,
City and County of New York,—ss.

Benjamin Blanchard, being first duly sworn, on his oath, deposes and says:

He is one of the petitioners named in the attached petition. He is of full age and a citizen of the United States of America, residing in the State of Missouri. The corporation named in the proceeding in bankruptcy, pending in the court, entitled in the attached motion, is duly organized, created and existing under the laws of the Territory of Arizona, and was so created in the month of September, A. D. 1901. The business of said corporation was and is generally defined to be the ownership and operating of mines and mineral lands, and all other character of real and personal property, including reduction works for the treatment of ores. The capital stock of said corporation was authorized to be five

million dollars, divided into five million shares of the par value of one dollar each.

The corporation petitioner herein is now and ever since the year 1892 has been a corporation under the laws of the Territory of Arizona, authorized specifically by its Articles of Incorporation to hold and own capital stock in other corporations, created for the same purpose as the respondent corporation. Affiant during all the times hereinafter named, ever since has been and is now a director of the corporation respondent, a director and president of the said Howell Mining Company, acted as vice-president and was general manager of the corporation respondent during all the times hereinafter named until and including March 15th, A. D. 1905.

He has entire charge and control of the business of the Howell Mining Company. In the month of September, 1901, the said Howell Mining Company was the owner of the greater and most valuable part of the real property and mining claims now owned and possessed by the respondent corporation.

Said Howell Mining Company sold said property in the year 1901 to the respondent corporation in consideration of the entire capital stock of respondent corporation, viz.: Five million shares of full paid capital stock. For the purpose of enabling respondent corporation to raise money from the general public by selling a part of said stock, for the purpose of developing and improving said property and erecting buildings, mills, smelters and other reduction works, said Howell Mining Company transferred to Robert B. Insley and respondent at various times,

prior to December, 1904, an aggregate of 1,750,000 shares of said capital stock; under the terms of said transfer, the same or sufficient thereof for the contemplated purposes was to be sold and the balance held for the benefit of the donor. During the years 1901, 1902, 1903 and 1904, there was actually sold by the officers of respondent corporation of said donated stock, erroneously termed "Treasury Stock," in excess of 650,000 shares, for a total aggregate selling price in excess of $400,000.00, four hundred thousand dollars, which sum of money was deposited in the treasury of the corporation respondent, and under the order of its Board of Directors and by affiant as General Manager expended judiciously, and with business judgment in the development and betterment and improvement of the mining property of the corporation respondent and the erection and maintenance of machinery and ore-reduction works upon the property of said company. Large blocks of said stock were sold and readily marketable, and had an actual valuation for sale in open market of one dollar per share, until about the month of June, 1904, and until the fraud, scheme and conspiracy herein specified had resulted in producing a public belief in the insolvency of the respondent corporation, and depreciating the value of said stock for sale purposes. The directors of said company representing to this affiant as general manager that ample funds from the sale of said stock would be supplied as fast as needed, caused this affiant to continue the employment of large numbers of laborers and min-

ers, and the continued improvement and betterment of the property of the company.

In or about the month of June, 1904, and in pursuance of said conspiracy and fraud, sales of said stock were suspended and rendered difficult.

That at said time and prior thereto the directors of said corporation respondent consisted of affiant, Arthur S. Kimberley, T. J. Roberts, T. P. Wallace, Frank Faxon and O. W. Philbrook and J. R. Burnham, who was then and now is the president of said company.

In order to raise money to pay said indebtedness and continue said development and betterment, said directors loaned sums of money to said corporation, and borrowed various sums of money, all on the notes of said company, aggregating in amount in excess of seventy-five thousand dollars, the principal part of which was loaned by said directors. That at said time there was, ever since has been and now is in the treasury of said corporation available for sale and in excess of one million three hundred thousand shares of the capital stock of said company, so donated by the Howell Mining Company.

At said time note-holders refused to loan said money unless said Howell Mining Company deposited with them capital stock of said company respondent, owned by it, as collateral security for the payment of said loans, in excess of four hundred thousand shares, which stock said Howell Mining Company so deposited as such collateral security, and which is still held by said note-holders.

In November, 1904, the Howell Mining Company was, ever since has been and now is the holder and owner of at least two million shares of the capital stock of the respondent corporation; at the same time and now said corporation respondent possessed in its treasury, subject to sale, for its benefit as aforesaid, at least one million three hundred thousand shares of said capital stock.

In November, 1904, there had been sold to divers and sundry persons, several hundred in number and resident in widely separated parts of the United States, an aggregate of exceeding six hundred and fifty thousand shares of said capital stock, for a purchase price paid to the corporation respondent and expended for its benefit in excess of four hundred thousand dollars.

In November, 1904, ever since and now, as affiant is informed and believes, and so alleges, the directors and officers of said corporation held and owned the following respective numbers of shares, viz.:

J. K. Burnham, 41,000 shares; Arthur S. Kimberley, 250,000 shares; T. J. Roberts, 90,000 shares; Frank A. Fuxon, 24,000 shares; P. W. Philbrook, 40,000 shares; T. P. Wallace, 7,100 shares;

A much larger part than the majority of the stock held by each one of said persons was not paid for in money by them, but was received by them as their interests in the property as held by the Howell Mining Company, with the exception of the stock held by T. P. Wallace. The said J. K. Burnham received about 33,000 shares of said stock from the Howell Mining Company for consenting to serve and serving

as President for two years, of the American Copper Company.

In November, 1904, ever since, and now, affiant was and is the holder and owner of 31,000 shares of the capital stock of said respondent.

In November, 1904, for the avowed purpose of depriving said corporation of its property and vesting it in a corporation to be created, controlled and owned by them, and depriving this affiant and said Howell Mining Company of all interest in said property as stockholders, and rendering their said stock worthless, a majority of the directors of said respondent corporation, at the direction and under the domination and control of the president, J. K. Burnham, and the secretary, Arthur S. Kimberly, at a meeting of the Board of Directors of said corporation, caused said Board to pass a resolution authorizing the president and secretary, as the act of the company, to execute a certain document assigning and conveying the property of the company to a trustee, a true copy of which is attached to this affidavit and made a part hereof. That said instrument was executed and delivered without the consent, knowledge, or approval of the majority of the stockholders of said company, without authority from stockholders at any stockholders' meeting; that the greater part of the indebtedness thereby alleged to be secured is held by the President, Secretary and Directors of said company, the item of $30,000 therein mentioned to be due Rice R. Miner, as affiant is informed and believes and so alleges, being in fact due to J. K. Burnham, who is the father in law of

Rice R. Miner. That the thirty-two notes of $1,000 each, payable to bearer, therein mentioned, have not been negotiated or sold in excess of $16,000, as affiant is informed and believes and so alleges. That said instrument is not in form or substance and not intended to be a general assignment for the benefit of creditors, and the trustee and grantee therein named received no possession of the property.

Said instrument is in form and substance an instrument to secure the payment of indebtedness; it was not intended to prevent other creditors from collecting their demands. In pursuance of said conspiracy, said officers and directors intended to personally to pay the claims of all creditors not therein included; but intended to utilize the power of sale expressed in said instrument as a quick and certain method of selling all the property en masse and acquiring the same by purchase for themselves, and well knowing that a public sale of property of the great magnitude and of the character of the property herein involved, no bids would probably be offered adequate to the real value or in excess of the amount claimed to be due under the deed of trust, and that they would be able to purchase the property en masse for the face of the alleged indebtedness.

In pursuance of such conspiracy, one Roland M. Hockaday, son in law of said J. K. Burnham, under the dominion and control of J. K. Burnham, and then an actual resident of Kansas City, Missouri, was named as the trustee or grantee in said instrument. The said conspirators being advised that such contemplated procedure would be resisted by legal ac-

tion, and wrongfully intending to further said purposes, caused said Roland M. Hockaday to remove to and become a resident of the Territory of Arizona; they caused their agents to induce Martindell, Horne & Co., Prescott Electric Company, R. H. Burmister Sons Co. and Head & Co., citizens of the Territory of Arizona and creditors of said respondent corporation, to an amount barely in excess of five hundred dollars, to present to this Honorable Court a petition, asking that said corporation respondent be adjudged an involuntary bankrupt, and in due course said Roland M. Hockaday was named as Trustee in Bankruptcy.

Knowledge of said insolvency proceedings was only communicated to and gained by affiant on February 11th, 1905, and the same was suppressed and concealed from him by his codirectors. That service of process of this Honorable Court on said petition, in pursuance of said conspiracy, was made on A. S. Kimberly, Secretary of said corporation and one of said conspirators, who suppressed knowledge of service and the institution of such proceedings from stockholders. That in pursuit of said conspiracy, said officers and directors refrained and caused attorneys who had acted for the corporation to refrain from making any defense to such application. Upon such application, the default of the respondent was entered and an adjudication in bankruptcy on default was given, rendered and made. Thereafter, and in further pursuance of said conspiracy, an appraisement was made of the property of the company, and the same was, at the instance of said con-

spirators, appraised at an approximate total of seventy-four thousand dollars. Thereafter, in pursuance of said conspiracy, an order of sale of said property was set for hearing March 4, 1905; that of all the said proceedings affiant and the officers of the Howell Mining Company were in entire ignorance and were purposely kept so by the conspirators, and affiant was not apprised of the same until a few days before the 4th of March, 1905. Upon being apprised of the same, affiant applied for and obtained an order through counsel postponing the hearing of said application for the order of sale until the 25th day of March, 1905.

In further pursuit of said conspiracy upon a pretended notice to the directors of one day, said conspirators, viz.: J. K. Burnham, A. S. Kimberly, T. P. Wallace and T. J. Roberts, pretended to hold a meeting of the Board of Directors of said corporation in the City of New York, on March 16, 1905, at which meeting affiant was present, but refused and declined to vote, and protested against the adoption of the resolution hereinafter referred to.

At said meeting, said directors proceeded to elect themselves as officers of said corporation for the next fiscal year. At said meeting for the purpose of legally preventing said corporation from entering an appearance in and defending these bankruptcy proceedings, the said directors wrongfully declared by resolution that the proceedings in bankruptcy were for the best interests of said corporation and the stockholders thereof, and was the most equitable

method of selling the property of the corporation to pay its debts.

That in said resolution said directors failed to declare that said corporation was in fact insolvent. This affiant avers that at the time of the execution of said deed of trust, at the time of the filing of said petition in bankruptcy, and at each and all of said times the said corporation was, ever since has been and now is solvent and abundantly able to pay its debts; that the fair value as well as the original cost of the trade fixtures of said corporation, upon its property in Yavapai County, Arizona, consisting of mining tools, supplies, machinery and buildings, exceeds $100,000, and that the actual value of its mines and mining property, estimated upon the recoverable value of the actual ore developed and in sight, in its mines, exceeds one million dollars.

That at divers and sundry times and at divers and sundry places, and during the years 1903 and 1904, the said conspirators, as officers and directors of said corporation, have given forth and maintained, having full knowledge of the facts that the property of said corporation, had and has a value exceeding five millions of dollars, and that the said officers and directors have personally sold to divers and sundry persons, upon such representation of value, large blocks of the capital stock of said corporation, at a price of one dollar per share, for the benefit of the treasury of the corporation.

That affiant and said Howell Mining Company are creditors of said respondent corporation in large amounts, upon provable debts and claims, based

upon open book accounts, viz.: Howell Mining Company to an amount exceeding $4,000, upon an open account, showing such indebtedness upon the books of account of respondent corporation for money advanced. The exact amount thereof is unknown to affiant, who is unable to specify the exact amount, the said books being in the possession of said conspirators. Said respondent is indebted to affiant in the sum of $5,000, due him for services as general manager, upon an express contract, the amount of which said corporation agreed to pay, but which has not been paid. Said corporation is further indebted to affiant upon an open account relating to the management of the business of said corporation and his disbursements of money in and about said business, while general manager, and during the year 1904, the balance upon which in favor of affiant will exceed the sum of $4,000, over and above all offsets and counterclaims, which is due, owing and unpaid.

That affiant as president of the Howell Mining Company, and on his own behalf, as creditors of said respondent, and as stockholders of said respondent, and for the benefit of all other stockholders, who may desire to join herein, has fully and fairly stated to counsel, viz.: Hon. Thomas Fitch and Francis Fitch and Hon. Robert E. Morrison, the facts of the case and all the facts relating to the affairs of said corporation and said conspiracy, and said deed of trust, and these proceedings in bankruptcy, and is by them advised, and verily believes, that as such creditors and on behalf and for the benefit of said corporation as stockholders, these petitioners have and

can and will maintain a good and sufficient defense to the allegations and issues set forth in the original petition for an adjudication in bankruptcy filed herein.

BEN BLANCHARD.

Sworn to and subscribed before me, a notary public, of the County of Queens, in the State of New York, duly commissioned and sworn, my certificate being duly filed in the offices of the County Clerk, of the Counties of Queens and New York, in the State of New York. The foregoing affidavit consisting of 10 pages were subscribed and sworn to before me, person and personally, by the said Benjamin Blanchard, this March 18th, 1905.

Witness my hand and notarial seal this March 18th, 1905.

[Seal] HENRY I. NEWELL,
Notary Public, Queens Co., N. Y.
Certft. filed in N. Y. County.

Certft. filed in N. Y. County.

[Endorsed]: Filed at 9:30 o'clock A. M. Mar. 25, 1905. J. M. Watts, Clerk.

AMERICAN COPPER COMPANY

to

R. M. HOCKADAY, Trustee.

Deed of Trust.

This deed of trust, made and entered into this fourth day of November, 1904, by and between The American Copper Company, a corporation duly organized and existing under and by virtue of the laws

of the Territory of Arizona (hereinafter called Company), the party of the first part, and Rollins M. Hockaday, Trustee, of Kansas City, Missouri (hereinafter called Trustee), party of the second part.

Witnesseth: The party of the first part, in consideration of the debts and trust hereinafter mentioned and created, and the sum of One Dollar ($1.00) to it paid by the party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain and sell, convey and confirm unto the party of the second part, all and singular the following described real estate and mining property situate, lying, and being in the Big Bug Mining District, in the County of Yavapai, in the Territory of Arizona, to wit:

Those certain mining claims and premises known as the Western Copper, Bonanza, Sure Thing, Eastern Copper, Copper Chief, Iron King, Lime Rock, Copper Platter, Copper Prince No. 1, Copper Prince, Copper Mount, Copper Van, Copper Prince No. 2, New Road, Copper Reade, Copper Peach, Copper Princess, Copper Road, Copper Dyke, and Copper Produce, lode mining claims, designated by the Surveyor General as Lot Number 1714, embracing a portion of sections fifteen, sixteen, twenty-one, twenty-two, and twenty-eight, in Township Thirteen, North of Range One East, Gila and Salt River Meridian, United States Patent whereof is dated the 16th day of May, 1904, and of record in Book 69 of Deeds, pages 178 to 191, Records of Yavapai County, Arizona, and for further full and particular description of said mines and mining claims, refer-

ence is hereby made to the said United States Patent and the said record thereof, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all rights, privileges and franchises thereto incident; appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise pertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well, in law as in equity, of the said party of the first part, of, in, or to the said premises and every part and parcel thereof, with the appurtenances. And also all mills, assay offices, machinery, pipe-lines, pumping plant, and pumping station, property, hoists, mining implements, and property of every kind, character and description, owned, held, used and enjoyed in connection with the above described mining property and premises. Also those three mining claims situate in the Agua Fria Mining District in Yavapai County, Arizona, known as the "Gold Flood" mining claim, notice of location whereof is in Book 69 of Mines, on page 471; "Gold Spring" mining claim, notice of location whereof is recorded in Book 69 of Mines at page 472; and the "Gold River" mining claim, notice of location whereof is recorded in Book 69 of Mines at page 473; same being records of the county recorder of Yavapai County, Arizona. And any and all other mines and mining rights owned by the party of the first part in Yavapai County, Arizona; and also all

and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises, and every part and parcel thereof, and the appurtenances.

Also all personal property of every kind, character and description owned, used, had and held by said company, in and upon any of the premises hereinbefore described, of every kind, character and description whatsoever. And it is convenanted and agreed that said personal property herein conveyed, or intended to be conveyed is all of the personal property owned by said company used in connection with the operation of said mines and mining claims in Yavapai County, Arizona; and it is hereby covenanted that the same shall be deemed real estate for all the purposes of this instrument, and shall be held and taken to be fixtures and appurtenances of the mortgaged premises and as a part thereof, and may be used and sold therewith.

The party of the first part hereby warrants the title to said property to be free and clear of all encumbrances of whatsoever character or kind, and covenants that it has good and perfect title to the property hereby conveyed.

To have and to hold the same with the appurtenances to the said party of the second part, and to his successor hereinafter designated, and to the as-

signs of him and his successor forever, in trust however, for the following purposes:

Whereas, the said Company did at the date herein mentioned, make and deliver its certain promissory notes for the amounts as follows, to wit:

On June 9th, 1904, one promissory note, due October 9th, 1904, to Rice R. Miner, for $30,000;

One promissory note dated June 9th, 1904, to T. P. Wallace, for $5,000, due October 9th, 1904;

One promissory note dated June 9th, 1904, to T. J. Roberts, for $5,000.00, due October 9th, 1904;

One promissory note of the said date, June 9th, 1904, to J. K. Burnham, due October 9th, 1904, for $5,000;

One promissory note dated June 9th, 1904, to the Burnham, Hanna, Munger D. G. Co., for $5,000, due October 9th, 1904;

One promissory note dated June 28th, 1904, to Faxon & Swofford as trustees, due October 28th, 1904, for $12,500;

One promissory note dated June 28th, 1904, to Wm. Barton, due October 28th, 1904, for $2,500;

One promissory note dated September 15th, 1904, to Andrew Ieken for $1,000, due December 15th, 1904.

One promissory note dated September 15th, 1904, to W. C. Taber, due December 15th, 1904, for $1,000;

One promissory note dated September 15th, 1904, to E. A. Fitter, due December 15th, 1904, for $1,000;

One promissory note dated September 15th, 1904, to F. H. Mattlage, due December 15th, 1904, for $500;

One promissory note dated September 15th, 1904, to O. A. Van Derlyn, due December 15th, 1904, for $500;

One promissory note dated September 15th, 1904, to W. E. Hollingshead, due December 15th, 1904, for $500;

One promissory note dated September 15th, 1904, to J. D. Pickles, due December 15th, 1904, for $500;

One promissory note dated September 15th, 1904, to A. S. Whitesell, due December 15th, 1904, for $500;

One promissory note dated September 15th, 1904, to J. Albert See, due December 15th, 1904, for $500;

One promissory note dated October 27th, 1904, to Faxon, Munger, Philbrook, Richards and Burnham, due December 27th, 1904, for $5,000;

One promissory note of even date herewith, due thirty days from date, to Thomas P. Wallace, for $1,000;

One promissory note of even date herewith to Thomas J. Roberts due thirty days from date for $1,000;

One promissory note of even date herewith to J. K. Burnham, due thirty days from date for $300;

One promissory note of even date herewith to Burnham, Hanna, Munger D. G. Co., due thirty days from date for $7,500;

And one promissory note of even date herewith to Arthur S. Kimberly, due thirty days from date for $2,500;

And thirty-two notes of even dates herewith for $1,000, each payable to bearer due on demand.

Each and all of said notes bearing interest at the rate of six per cent per annum from the date thereof.

Now, if the said note and interest thereon be paid when due, then these presents shall be void and the property herein conveyed shall be released, at the cost of the party of the first part, but if default be made in the payment of said notes, or any part thereof; or any of the interest thereon when due, then all of the said notes shall become due and be paid as herein provided, and this deed shall remain in full force; and the said party of the second part, or in case of his death, inability or refusal to act then the (then) Sheriff of the said County of Yavapai, Arizona, (who shall thereupon become his successor in this trust for the purpose and objects of these presents, and with all the powers, duties and obligations thereof) may proceed to sell the property hereinbefore described and any and every part thereof, at public vendue to the highest bidder, at the north front door of the Courthouse at Prescott, Arizona, in the County of Yavapai, aforesaid for cash, first giving thirty (30) days public notice of the time, terms and place of sale, and of the property to be sold, by advertisement in some newspaper printed and published in Prescott, Arizona, which publication shall be at least once a week for four consecutive weeks next preceding such sale, and from time to time to adjourn such sale in his discretion and without further notice to hold such a sale or adjourned sale, and upon any sale or sales hereunder, to make, execute, and deliver to the purchaser or purchasers of the premises, estate, property, rights,

and franchises so sold, a good and sufficient deed or deeds for the same which sale shall be a perpetual bar, both in law and in equity, against the American Copper Company, and all persons and corporations lawfully claiming or to claim by, through or under it, and, upon the making of such sale the principal of all notes hereby secured and then outstanding shall forthwith become due and payable, anything in said notes to the contrary notwithstanding and upon the making of any such sale, the said Trustee shall apply the proceeds thereof as follows, to wit:

1. To the payment of the costs and expenses of such sale or sales, including a reasonable compensation to such trustee, his agents, attorneys and counsel, and all expenses, liabilities and advances made and incurred by such trustee in managing and maintaining the property hereby conveyed and all taxes and assessments superior to the lien of these presents.

2. To the payment of the whole amount of principal and interest which shall then be owing or unpaid upon the note secured hereby, without any preference or priority whatever, whether the said principal, by the tenor of said notes, be then due or yet to become due; and in case of the insufficiency of such proceeds to pay in full the whole amount of such principal and interest owing and unpaid upon the said notes, then to the payment of such principal and interest pro rate, without preference or priority, but ratably to the aggregate amount of such principal and accrued and unpaid interest.

3. To pay over the surplus, if any, to the American Copper Company, its successors or assigns.

All of the notes herein secured and above described shall stand upon a parity so that each holder thereof is alike secured pro rata by this instrument and no right of action shall exist in any holder of said notes under this Deed of Trust, but all the rights under this deed, including that of foreclosure if desired to be exercised, shall rest exclusively in the trustee herein named or his successor. The trustee is hereby vested with discretion to determine whether the power of sale shall be exercised in case of default, but he shall be required to sell under the terms of this instrument whenever a majority in amount of the debts secured hereby shall demand of him so to do.

The said party of the second part covenants faithfully to perform the duties herein created.

In witness where, the said party of the first part has caused these presents to be signed by its President, and its corporate seal to be hereunto affixed, attested by its Secretary, being authorized so to do by resolution of its Board of Directors, and the second party has signed these presents, on the day and year first above written.

[Corporate Seal]

THE AMERICAN COPPER COMPANY,
By J. K. BURNHAM,
President.

ROLLINS M. HOCKADAY,
Trustee.

Attest: ARTHUR S. KIMBERLY, Secretary.

State of Missouri,
County of Jackson,—ss.

Before me, Amy Z. Cruise, a Notary Public in and for said County and State, on this day personally appeared J. K. Burnham, to me known to be the President, and Arthur S. Kimberly, to me known to be the Secretary, of the American Copper Company, a corporation, and each being by himself duly sworn, did depose and say that he knew the corporate seal of said corporation, and that the seal affixed to said instrument was such corporate seal, and it was so affixed and the foregoing instrument executed by authority of a resolution of the Board of Directors of said corporation, and that he had signed his name thereto by like order; and they each acknowledged to me that said corporation executed the foregoing instrument for the consideration and purposes therein expressed.

Given under my hand and seal of office this 5th day of November, A. D. 1904.

[Notarial Seal] AMY Z. CRUISE,
Notary Public.

My commission expires August 10th, 1907.

State of Missouri,
County of Jackson,—ss.

Before me, Amy Z. Cruise, a Notary Public in and for said County and State, on this day personally appeared Rollins M. Hockaday, known to me as the person named in the foregoing instrument, and ac-

knowledged to me that he had executed same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 5th day of November, 1904.

[Notarial Seal] AMY Z. CRUISE,
Notary Public.]

My commission expires August 10th, 1907.

Recorded at request of Hawkins, Ross & Anderson, Nov. 9, A. D. 1904, at 9:00 o'clock A. M., in Book 23 of Mortgages, pages 53-60, Records of Yavapai County, Arizona.

P. J. FARLEY,
County Recorder.
By M. B. Farley,
Deputy.

[Endorsed]: Filed at 9:30 o'clock A. M., Mar. 25, 1905. J. M. Watts, Clerk.

[Exhibit "D" to Petition for Review.]

In the District Court of the Fourth Judicial District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy.

In the Matter of THE AMERICAN COPPER COMPANY,
Bankrupt.

Demurrer to Stockholders' Petition.

Before Honorable RICHARD E. SLOAN, Judge of said Court:

Come now G. W. Ammons, Brisley Drug Company, C. Frank Boughton, R. H. Burmister & Sons

Company, Burnham-Hanna-Munger Dry Goods Company, William Barton, J. K. Burnham, F. W. Braun Company, Byron Jackson Machine Works, Corbin & Bork, Fairbanks-Morse & Company, Faxon & Swofford, Lee Fong, E. A. Fitter, Ferrofix Brazing Company, A. J. Head, W. E. Hollingshead, Hawkins & Ross, Andrew Icken, Arthur S. Kimberly, James H. Killough, J. George Leyner Engineering Works, J. J. Murray, Meese & Gottfried Company, F. H. Mattledge, Martindell, Horne & Company, R. R. Miner, New England National Bank, Prescott Title Company, Owen W. Philbrook, The Prescott Electric Company, T. J. Roberts, Postal Telegraph-Cable Company, Phillips & Sons, J. D. Pickles, Frank E. Stults, J. Albert See, Stetson-Preston Company, A. Schilling & Company, The Lewin Meyer Company, Valley Pride Creamery, O. A. Van Derlyn, Thomas P. Wallace, A. S. Whitesell, Western Union Telegraph Company, W. C. Taber and Westinghouse Electric and Manufacturing Company, creditors, who, by the records of this court in the above-entitled matter, have proven and had allowed against said bankrupt their several debts, aggregating in the neighborhood of One Hundred and Eight Thousand Dollars ($108,000.00), and not confessing or acknowledging the truth of all or any of the matters and things set forth in the petition heretofore filed herein by Ben Blanchard and Howell Mining Company as alleged stockholders of said bankrupt, and in response to the order to show cause

heretofore issued upon said petition by this Court, demur to said petition and for cause of demurrer show:

1. That said petition is entirely without equity.

2. That it appears from the face of said petition that there is non-joinder of proper and necessary parties thereto, in this, to wit, that J. K. Burnham, A. S. Kimberly, and other members of the Board of Directors of said bankrupt, of whose alleged acts petitioners herein complain, are not made parties thereto.

3. That it appears from said petition that said petitioners have, and each of them has, an adequate remedy at law for and on account of the wrongs and injuries alleged by them.

4. That it appears from said petition that no valid defense exists to the petition in bankruptcy upon which the adjudication complained of was made and issued.

5. That said petitioners do not, nor does either of them, offer to do equity to these creditors or to any of the creditors whose claims have been filed and allowed in said bankruptcy matter.

6. That it appears from said petition that said petitioners are not entitled to the relief prayed for.

7. That it appears from said petition that said petitioners have been guilty of laches in the assertion of the matters set up therein, in this, to wit, that they have unreasonably delayed the assertion of said matters until after the rights of innocent third persons, creditors of said bankrupt, have intervened.

8. That it appears from said petition that said petitioners have not, nor has either of them, capacity to intervene in this proceeding.

9. That said petition fails to show any wrong or injury to said petitioners or either of them, either completed or threatened, for which reason they have no standing in equity.

10. That said petition in no respect complies with the requirements of equity rule 94 of the United States Supreme Court.

11. That said petition does not allege facts sufficient to entitle said petitioners to the relief prayed for.

Wherefore, said creditors pray that said petitioners take nothing by their said petition, but that the same shall be overruled and denied, and they further pray that the order to show cause issued upon said petition be annulled, vacated and discharged and that they may have their costs in this behalf expended.

HAWKINS & ROSS,
Attorneys for Creditors Above Named.

[Endorsed]: Filed May 24th, 1905, at 9:30 o'clock A. M. J. M. Watts, Clerk.

[Exhibit "Da" to Petition for Review.]

In the District Court of the Fourth Judicial District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy.

In the Matter of THE AMERICAN COPPER COMPANY,

Bankrupt.

Motion to Strike Stockholders' Petition.

Before Honorable RICHARD E. SLOAN, Judge of said Court:

Come now G. W. Ammons, Brisley Drug Company, C. Frank Boughton, R. H. Burmister & Sons Company, Burnham-Hanna-Munger Dry Goods Company, William Barton, J. K. Burnham, F. W. Braun Company, Byron Jackson Machine Works, Corbin & Bork, Fairbanks-Morse & Company, A. J. Head, W. E. Hollingshead, Hawkins & Ross, Andrew Ieken, Arthur S. Kimberly, James H. Killough, J. George Leyner Engineering Works, J. J. Murray, Meese & Gottfried Company, F. H. Mattledge, Martindell, Horne & Company, R. R. Miner, New England National Bank, Prescott Title Company, Owen W. Philbrook, The Prescott Electric Company, T. J. Roberts, Postal Telegraph-Cable Company, Phillips & Sons, J. D. Pickles, Frank E. Stults, J. Albert See, Stetson-Preston Company, A. Schilling & Company, The Lewin Meyer Company, Valley Pride Creamery, O. A. Van Derlyn, Thomas P. Wallace, A. S. Whitesell, Western Union Telegraph Company, W. C. Taber,

Faxon & Swofford, Lee Fong, E. A. Fitter, Ferrofix Brazing Company, and Westinghouse Electric and Manufacturing Company, creditors, who, by the records of this court in the above-entitled matter, have proven and had allowed against said bankrupt their several debts, aggregating in the neighborhood of One Hundred and Eight Thousand Dollars ($108,000.00), and respectfully move this Honorable Court to strike from its files the petition heretofore filed in this matter by Ben Blanchard and Howell Mining Company, appearing as stockholders of said bankrupt, and in support of their said motion said creditors respectfully show to the Court:

1. That said Ben Blanchard and Howell Mining Company, in their alleged character of stockholders of said bankrupt, have no capacity to intervene in the above-entitled matter.

2. That said alleged stockholders, in their character as such, are strangers to the above-entitled bankruptcy proceedings.

Wherefore, said creditors pray:

1. That said petition be stricken from the files of this court;

2. That the order to show cause heretofore issued by this Court upon said petition be vacated, annulled and set aside;

3. For their costs in this behalf expended and such other and different relief as may appear to the Court proper in the premises.

HAWKINS & ROSS,
Attorneys for said Creditors.

[Endorsed]: Filed May 24, 1905, at 9:30 o'clock A. M. J. M. Watts, Clerk.

[Exhibit "E" to Petition for Review.]

In the District Court of the Fourth Judicial District of the Territory of Arizona.

IN BANKRUPTCY.

In the Matter of THE AMERICAN COPPER COMPANY,

Bankrupt.

Order [Denying Petition of Ben Blanchard et al., etc.].

The Court having considered upon reading and filing the foregoing petition, and having considered the application of Ben Blanchard and Howell Mining Company herein for a separate order and ruling of this Court upon the demurrer to the petition of said Blanchard and Howell Mining Company, appearing as alleged stockholders of said bankrupt, filed on March 25, 1905, finds that said two petitions, as referred to in the foregoing, were heard by the Court together, and were substantially identical and were supported by the same affidavit asking the same relief, both as stockholders and as creditors, and that the decision of the Court rendered on the 19th day of December, 1905, was intended by the Court and did determine all issues of law presented to it by both of said petitions on behalf of Ben Blanchard and Howell Mining Company to the demurrers thereto, and said petition as stockholders has not been un-

der advisement by this Court since that time and was wholly decided by this Court at that time; that from the date of said decision to the present time no suggestion has ever been made to this Court by counsel on either side that anything remained in dispute in connection with said petitions or either of them. That it was intended by the Court in its said decision to dispose of all the issues and matters theretofore submitted and pending arising under said petitions and the demurrers thereto, and that if the minute entry of December 19th, 1905, appertaining thereto does not in form and effect dispose of the application to set aside the adjudication of bankruptcy heretofore made in these proceedings as prayed for in both said petitions, then such failure and omission to dispose of both said petitions were the result of inadvertence and mistake; that inasmuch as a *nunc pro tunc* order might result to the disadvantage of petitioners in denying them the full benefit and right of appeal,—

It is ordered as of this day that in accordance with the decision of the Court heretofore made and filed, the application made by Ben Blanchard and the Howell Mining Company for an order setting aside the order of adjudication of bankruptcy heretofore made and for other relief as prayed in the petitions heretofore filed by them, is denied, and the petition of Benjamin Blanchard and the Howell Mining Company, in which they allege themselves to be stockholders of the American Copper Company, is ordered dismissed, together with the petition of the

same parties in which they alleged themselves to be creditors of the said American Copper Company.

Done in open court this 27th day of April, 1909.

RICHARD E. SLOAN,

Judge.

[Endorsed]: Filed at 4 o'clock P. M. Apr. 27, 1909. J. M. Watts, Clerk.

[Exhibit "F" to Petition for Review.]

Decision of Trial Court.

Title of Court and Cause Omitted.

On the 25th day of January, 1905, a petition signed by certain creditors of the American Copper Company, a corporation, was filed in this court praying that said corporation be declared bankrupt upon the ground that it had, within four months prior thereto, made a general assignment of all its property for the benefit of its creditors.

On the 7th day of February, 1905, a judgment by default was entered adjudging said American Copper Company a bankrupt, whereupon the case was referred to the referee for further proceedings.

On the 25th day of March, 1905, Benjamin Blanchard and the Howell Mining Company, a corporation, petitioned the Court for an order vacating and setting aside the default and judgment theretofore entered in the cause and all subsequent orders and proceedings had under said judgment. The grounds assigned in the petition for the relief prayed for were that at the time of the filing of the petition in bankruptcy the American Copper Company was and ever

since has been solvent; that the petition praying for the adjudication of bankruptcy failed to allege the commission of any act of bankruptcy on the part of the corporation; that the conveyance charged in said petition to have been an act of bankruptcy was not a general assignment for the benefit of creditors, and further, that no other act of bankruptcy was or had been committed by the corporation. The petition further charged that the application for the adjudication of bankruptcy against the corporation was the result of a fraudulent conspiracy on the part of the officers of the corporation.

With the petition was filed the affidavit of Benjamin Blanchard in support of the allegations thereof. There was also attached to and made a part of the petition the conveyance referred to in the creditor's petition. This conveyance is in form a deed of trust, and was made and entered into on the 4th day of November, 1904, by and between the American Copper Company and Rollins M. Hockaday, trustee, and conveyed all the property of the grantor to said Hockaday to secure the payment of a number of promissory notes aggregating the sum of $121,100.00; many of these notes were dated prior to the execution of the trust deed, the others bear even date therewith.

The proceedings in the case and the record before the Court show that the American Copper Company was, at the time of the institution of these proceedings, insolvent. The only question for determination is whether or not the record shows that an act

of bankruptcy had been committed within four months prior to the filing of the creditor's petition.

The conveyance made by the American Copper Company to Hockaday as trustee is before the Court on this application. A cursory examination makes it evident that it was not in effect or even in terms a general assignment for the benefit of creditors, it was, however, a conveyance of the property of the corporation in trust for the purpose of securing certain creditors of the corporation. It was, in effect, a mortgage of all the property of the corporation to secure, among others, holders of the notes of the corporation executed prior to this conveyance.

It has been held that a corporation which is at the time insolvent and which mortgages its property to secure a pre-existing indebtedness, commits an act of bankruptcy by preferring the creditors so secured over other creditors.

In re Wright Lumber Company, 114 Fed. Rep. 1011.

While, therefore, the specific act of bankruptcy complained of by the petitioning creditors is not shown to have been committed, it does appear that another act of bankruptcy was, by said conveyance, committed by the corporation. The variance is one which may be cured by amendment. The showing, therefore, appears to the Court to be insufficient for the vacation of the default and the setting aside of the judgment of adjudication, inasmuch as it would be unavailing to the petitioners, Blanchard and Howell Mining Company, for the reason that by an

amendment made to the creditor's petition another judgment of like effect to the former would be entered upon the hearing of the cause.

If it did not appear that the American Copper Company was insolvent, or if it appeared that no act of bankruptcy had in truth been committed by the corporation, the Court would feel that it was in duty bound to set aside the order of adjudication, but where the contrary appears and it is shown that the corporation was not only insolvent, but had in truth committed an act of bankruptcy; the fact that the petition alleged no other act of bankruptcy than that which was committed amounts to a mere irregularity which does not call for the relief prayed for in this proceeding.

The application is denied.

RICHARD E. SLOAN,
Judge.

[Endorsed]: Filed at ——— o'clock —— M., Dec. 19, 1905. J. M. Watts, Clerk.

[Endorsed]: No. 1722. United States Circuit Court of Appeals for the Ninth Circuit. Ben Blanchard and The Howell Mining Company, Stockholders of The American Copper Company, Petitioners, vs. G. W. Ammons, Brisley Drug Company et al., Creditors of The American Copper Company, Bankrupt, Respondents. In the Matter of The American Copper Company, Bankrupt. Petition for Revision.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898, to Revise in Matter of Law the Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

Filed June 7, 1909.

F. D. MONCKTON,
Clerk.

No. 1722

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

BEN BLANCHARD and THE HOWELL MINING COMPANY, Stockholders of the American Copper Company,

Petitioners,

vs.

G. W. AMMONS, BRISLEY DRUG COMPANY et al., Creditors of the American Copper Company, Bankrupt,

Respondents.

In the Matter of the AMERICAN COPPER COMPANY, Bankrupt.

Supplemental Transcript of Record on Petition for Revision.

Upon Petition for Revision Under Section 24b of Bankruptcy Law of July 1, 1898, to Revise in Matter of Law the Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1722

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Supplemental Transcript of Record on Petition for Revision.

Upon Petition for Revision Under Section 24b of Bankruptcy Law of July 1, 1898, to Revise in Matter of Law the Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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At a stated term, to wit, the October term, A. D. 1909, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the seventh day of February, in the year of our Lord one thousand nine hundred and ten; Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 1722.

BEN BLANCHARD and THE HOWELL MINING COMPANY, Stockholders of the American Copper Company,

v.

Petitioners,

G. W. AMMONS, BRISLEY DRUG COMPANY et al., Creditors of the American Copper Company, Bankrupt,

Respondents.

In the Matter of the AMERICAN COPPER COMPANY,

Bankrupt.

Order [Requiring the Petitioners to Supplement Their Record of Petition for Revision].

It is ordered by the Court that the petitioners supplement their record of petition for revision now on file in this court by furnishing a copy of the petition filed by petitioners in intervention as creditors, referred to by the lower court in its order dated April 27, 1909, denying the petition of Blanchard et al.

(pages 50, 51 and 52 of the Transcript), together with any exhibits that were attached to said petition and made a part thereof in the lower court; also any affidavits filed with said petition; also a copy of the minute entry of the lower court pertaining to the bankruptcy matter herein involved, dated and entered December 19, 1905; said minute entry being the same referred to in the aforesaid order of the lower court dated April 27, 1909, page 51 of the Transcript now on file.

Petitioners are hereby granted twenty days from February 7, 1910, in which to file the papers hereinbefore referred to.

[Petition of Benjamin Blanchard and The Howell Mining Company to the District Court to Vacate the Default of The American Copper Company, etc.]

In the District Court of the United States for the Fourth District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy Under the Laws of the United States.

IN BANKRUPTCY.

In the Matter of the AMERICAN COPPER COMPANY,

Bankrupt.

To the Honorable R. E. SLOAN, Judge of said Court:

The petition of Benjamin Blanchard and of How-

ell Mining Company, a corporation, respectfully shows to this Court:

I.

That Howell Mining Company is a corporation duly created, organized and existing under the laws of the Territory of Arizona; that said Benjamin Blanchard is a resident of the city of Kansas City, State of Missouri, and that American Copper Company is a corporation duly created, organized and existing under the laws of the Territory of Arizona.

II.

That your petitioners are creditors of said American Copper Company, owning and holding provable claims against said American Copper Company in the sums of $9,000 and $4,000, or thereabouts, respectively, as follows, to wit: For moneys loaned, advanced to or paid out for said American Copper Company, at its special instance and request, by your petitioner, Benjamin Blanchard, in the sum of $4,000 or thereabouts, and on account of salary due, owing and unpaid to him as general manager of said American Copper Company, under express contract, in the sum of $5,000, and for moneys loaned, advanced to or paid out for said American Copper Company by your petitioner, Howell Mining Company, upon open account, in the sum of $4,000, or thereabouts.

III.

That heretofore, viz., on the 25th day of January, 1905, a petition in involuntary bankruptcy was filed herein by the Prescott Electric Company, R. H. Bur-

mister and Sons Company, Martindell Horn & Co. and A. J. Head, petitioning creditors therein, against said American Copper Company, a corporation as aforesaid, praying that said corporation be adjudicated a bankrupt, and alleging that said corporation had, prior to the filing of said petition, committed certain acts of bankruptcy in said petition set forth and alleged; and that thereupon such proceedings were had and taken herein that an order was duly made or given herein in and by this Court, on or about the 7th day of February, 1905, adjudicating and decreeing said American Copper Company a corporation, a bankrupt.

IV.

That at or prior to the time of the filing of said petition, said American Copper Company, the alleged bankrupt, was, ever since has been, and now is, solvent, and that the petition herein praying for an adjudication of bankruptcy against American Copper Company, the respondent, does not allege or set forth the commission or permission of any act or acts of bankruptcy by respondent; that the transfer, conveyance, or instrument in writing alleged in said petition to have been made and executed by the respondent and charged in said petition as an act of bankruptcy was not, and is not, a general assignment for the benefit of a creditor or creditors. That said respondent, in or by said instrument, or otherwise, or at any time, or at all, has not conveyed, transferred, concealed or removed, or permitted to be concealed, or removed, any part of its property with intent to hinder, delay, or defraud its creditors, or any of

them. That said respondent, in or by said instrument or otherwise, or at any time or at all, has not transferred, while insolvent, any portion of its property to one or more of its creditors with intent to prefer such creditor or creditors over its other creditors. That said respondent has not at any time suffered or permitted any creditor to obtain a preference through legal proceedings. That said respondent has never at any time made a general assignment for the benefit of its creditors, and has not applied for a receiver or trustee for its property, and that no receiver or trustee has ever been put in charge of its property under the laws of a state, territory or of the United States, except in this proceeding. That said respondent has never admitted in writing or otherwise its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

V.

That a majority of the directors and the President and Secretary of respondent, in pursuance of a fraudulent conspiracy, caused the petitioning creditors to join in and cause to be filed herein said involuntary petition in bankruptcy against said respondent, and that said petition was caused to be filed by them and said bankruptcy proceedings against said respondent were caused to be instituted by them by said persons fraudulently, and without just or sufficient cause therefor, and in pursuance of and in order to carry out a wrongful, fraudulent and collusive scheme and agreement theretofore made and entered into between the officrs and a majority

of the directors of said corporation, the alleged bankrupt, and for the purpose of wrongfully and fraudulently harassing and annoying said alleged bankrupt, and acquiring its property and obtaining control and possession thereof, to the injury of your petitioners and other creditors of the respondent corporation, all of which is more fully set forth in the affidavit of Benjamin Blanchard, one of your petitioners, attached hereto and marked Exhibit "A," and which said affidavit is hereby made a part hereof.

Wherefore, your petitioners ask and pray that an order be made herein as follows:

1st. Vacating and setting aside the default and the order entering the default of American Copper Company;

2nd. Vacating and setting aside the order or judgment heretofore given or made herein declaring and adjudicating American Copper Company a bankrupt, and all subsequent orders relating thereto and proceedings had herein;

3rd. Vacating and setting aside any order heretofore made herein for the sale of the property of said alleged bankrupt or for a hearing thereon;

4th. Permitting your petitioners to intervene herein, and to plead to said involuntary bankruptcy petition, and to file herein their answer and objection, or answers or objections to said petition and to the prayer of said petition, and to contest the same.

That an order of this Honorable Court and under the seal of this court, together with a subpoena, issue herein, directing and requiring the creditors of American Copper Company, who joined in and

caused to be filed said involuntary bankruptcy proceeding against the respondent, the American Copper Company, the respondent corporation, and any and all persons interested herein as creditors or otherwise, to appear at and before this court, as a court of bankruptcy, to be holden at the courthouse in Prescott, Yavapai County, Arizona, in the district aforesaid, at a time to be fixed in or by said order by this Court or a Judge thereof, then and there to show cause, if any there be, why the prayer of this petition should not be granted.

And your petitioners further pray that they may be permitted, upon the hearing or trial of their said petition, to produce witnesses in court, examine them at such hearing or trial, and use their testimony thereat and therein, and to present at and in said hearing or trial such further or additional affidavits or proof as they may be advised, in support of their said petition and in proof of the allegations contained therein; and that in the meantime and until the final disposition of their said petition and matters here presented, and the further order of this Court, Thomas C. Job, Referee in Bankruptcy herein, and Rollins M. Hockaday, Trustee in Bankruptcy herein, be enjoined and restrained from in any way proceeding with the sale of the property of said alleged bankrupt, or in any petition, proceeding or proceedings, filed, had or pending in connection with such sale, or to obtain an order for such sale.

Dated City of New York, State of New York, March 18th, 1905.

ROBERT E. MORRISON,
Attorney for Petitioners,
Residing at Prescott, Ariz.
THOMAS FITCH,
Attorney for Petitioners,
Residing at 42 Broadway, New York.
FRANCIS FITCH,
Attorney for Petitioners,
Residing at 42 Broadway, New York City.

State of New York,
County of New York,—ss.

Benjamin Blanchard, being first duly sworn, deposes and says, that he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

BEN BLANCHARD.

Subscribed and sworn to before me this 18th day of March, 1905.

[Notarial Seal] HENRY I. NEWELL,
Notary Public, Queens Co., N. Y.
Certft. filed in N. Y. County.

Certft. filed in N. Y. County.

[Exhibit "A" to the Petition of Benjamin Blanchard and The Howell Mining Company to Vacate the Default of the American Copper Company, etc.]

In the District Court of the United States for the Fourth Judicial District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy Under the Laws of the United States.

IN BANKRUPTCY.

In the Matter of THE AMERICAN COPPER COMPANY,

Bankrupt.

State of New York,
City and County of New York,—ss.

[Affidavit of Benjamin Blanchard, Dated March 18, 1905.]

Benjamin Blanchard, being first duly sworn, on his oath deposes and says:

He is one of the petitioners named in the attached petition. He is of full age and a citizen of the United States of America, residing in the State of Missouri. The corporation named in the proceeding in bankruptcy, pending in the court entitled in the attached motion is duly organized, created and existing under the laws of the Territory of Arizona, and was so created in the month of September, A. D. 1901. The business of said corporation was and is generally defined to be the ownership and operating

of mines and mineral lands and all other character of real and personal property, including reduction works for the treatment of ores. The capital stock of said corporation was authorized to be five million dollars, divided into five million shares of the par value of one dollar each.

The corporation petitioner herein is now and ever since the year 1902 has been a corporation under the laws of the Territory of Arizona, authorized specifically by its Articles of Incorporation to hold and own capital stock in other corporations created for the same purposes as the respondent corporation. Affiant, during all the times hereinafter named, ever since has been and is now a director of the corporation respondent, a director and president of the said Howell Mining Company, acted as vice-president and was general manager of the corporation respondent during all the times hereinafter named until and including March 15th, A. D. 1905.

He has entire charge and control of the business of the Howell Mining Company. In the month of September, 1901, the said Howell Mining Company was the owner of the greater and most valuable part of the real property and mining claims now owned and possessed by the respondent corporation.

Said Howell Mining Company sold said property in the year 1901 to the respondent corporation in consideration of the entire capital stock of respondent corporation, viz., five million shares of full paid capital stock. For the purpose of enabling respondent corporation to raise money from the general public by selling a part of said stock, for the pur-

pose of developing and improving said property and erecting buildings, mills, smelters and other reduction works, said Howell Mining Company transferred to Robt. B. Insley and respondent at various times, prior to December, 1904, an aggregate of 1,750,000 shares of said capital stock; under the terms of said transfer, the same or sufficient thereof for the contemplated purposes was to be sold and the balance held for the benefit of the donor. During the years 1901, 1902, 1903 and 1904, there was actually sold by the officers of respondent corporation of said donated stock, erroneously termed "Treasury Stock," in excess of 650,000 shares, for a total aggregate selling price in excess of $400,000, four hundred thousand dollars, which sum of money was deposited in the treasury of the corporation respondent, and under the order of its Board of Directors and by affiant as general manager expended judiciously, and with business judgment in the development and betterment and improvement of the mining property of the corporation respondent and the erection and maintenance of machinery and ore reduction works upon the property of said company. Large blocks of said stock were sold and readily marketable, and had an actual valuation for sale in open market of one dollar per share, until about the month of June, 1904, and until the fraud, scheme and conspiracy herein specified had resulted in producing a public belief in the insolvency of the respondent corporation, and depreciating the value of said stock for sale purposes. The directors of said company representing to this affiant, as gen-

eral manager, that ample funds from the sale of said stock would be supplied as fast as needed, caused this affiant to continue the employment of large numbers of laborers and miners, and the continued improvement and betterment of the property of the company.

In or about the month of June, 1904, and in pursuance of said conspiracy and fraud, sales of said stock were suspended and rendered difficult.

That at said time and prior thereto the directors of said corporation respondent consisted of affiant, Arthur S. Kimberly, T. J. Roberts, T. P. Wallace, Frank Faxon and O. W. Philbrook and J. R. Burnham, who was then, and is now, the president of said company.

In order to raise money to pay said indebtedness and continue said development and betterment, said directors loaned sums of money to said corporation, and borrowed various sums of money, all on the notes of said company, aggregating an amount in excess of seventy-five thousand dollars, the principal part of which was loaned by said directors. That at said time there was, ever since has been, and now is, in the treasury of said corporation, available for sale and in excess of one million three hundred thousand shares of the capital stock of said company, so donated by the Howell Mining Company.

At said time said note-holders refused to loan said money, unless said Howell Mining Company deposited with them capital stock of said company respondent, owned by it, as collateral security for the payment of said loans, in excess of four hundred

thousand shares, which stock said Howell Mining Company so deposited as such collateral security, and which is still held by said note-holders.

In November, 1904, the Howell Mining Company was, ever since has been, and now is, the holder and owner of at least two million shares of the capital stock of the respondent corporation; at the same time and now said corporation respondent, possessed in its treasury, subject to sale, for its benefit as aforesaid at least one million three hundred thousand shares of said capital stock.

In November, 1904, there had been sold to divers and sundry persons, several hundred in number and resident in widely separated parts of the United States, an aggregate of exceeding 650,000 shares of said capital stock, for a purchase price paid to the corporation respondent and expended for its benefit in excess of four hundred thousand dollars.

In November, 1904, ever since and now, as affiant is informed and believes, and so alleges, the directors and officers of said corporation held and owned about the following respective numbers of shares, viz.: J. K. Burnham, 41,000 shares; Arthur S. Kimberly, 250,000 shares; T. J. Roberts, 90, 000 shares; Frank A. Fuxon, 24,000 shares; P. W. Philbrook, 40,000 shares; T. P. Wallace 7,100 shares.

A much larger part than the majority of the stock held by each one of said persons was not paid for in money by them, but was received by them as their interests in the property as held by the Howell Mining Company, with the exception of the stock held by T. P. Wallace. The said J. K. Burnham re-

ceived about 33,000 shares of said stock from the Howell Mining Company for consenting to serve and serving as president for two years of the American Copper Company.

In November, 1904, ever since and now, affiant was and is the holder and owner of 31,000 shares of the capital stock or said respondent.

In November, 1904, for the avowed purpose of depriving said corporation of its property and vesting it in a corporation to be created, controlled and owned by them, and depriving this affiant and said Howell Mining Company of all interest in said property as stockholders and rendering their said stock worthless, a majority of the directors of said respondent corporation, at the direction and under the domination and control of the president, J. K. Burnham and the secretary, Arthur S. Kimberly, at a meeting of the Board of Directors of said corporation, caused said board to pass a resolution authorizing the president and secretary as the act of the company to execute a certain document assigning and conveying the property of the company to a trustee, a true copy of which is attached to this affidavit and made a part hereof. That said instrument was executed and delivered without the consent, knowledge or approval of the majority of the stockholders of said company, without authority from stockholders at any stockholders' meeting; that the greater part of the indebtedness thereby alleged to be secured is held by the president, secretary and directors of said company, the item of $30,000 therein mentioned to be due Rice R. Miner, as affiant is informed

and believes, and so alleges, being in fact due to J. K. Burnham, who is the father-in-law of Rice R. Miner. That the thirty-two notes of $1,000 each, payable to bearer therein mentioned, have not been negotiated or sold in excess of $16,000, as affiant is informed and believes, and so alleges: That said instrument is not in form or substance, and not intended to be, a general assignment for the benefit of creditors, and the trustee and grantee therein named received no possession of the property.

Said instrument is in form and substance an instrument to secure the payment of indebtedness; it was not intended to prevent other creditors from collecting their demands. In pursuance of said conspiracy, said officers and directors intended to personally pay the claims of all creditors not therein included; but intended to utilize the power of sale expressed in said instrument as a quick and certain method of selling all the property en masse and acquiring the same by purchase for themselves and well knowing that at a public sale of property of the great magnitude and of the character of the property herein involved, no bids would probably be offered adequate to the real value or in excess of the amount claimed to be due under the deed of trust, and that they would be able to purchase the property en masse for the face of the alleged indebtedness.

In pursuance of such conspiracy, one Roland M. Hockaday, son-in-law of said J. K. Burnham, under the dominion and control of J. K. Burnham, and then an actual resident of Kansas City, Missouri, was named as the trustee or grantee in said instru-

ment. The said conspirators being advised that such contemplated procedure would be resisted by legal action, and wrongfully intending to further said purposes, caused said Roland M. Hockaday to remove to and become a resident of the Territory of Arizona; they caused their agents to induce Martindell, Horne & Co., Prescott Electric Company, R. H. Burmister Sons Co. and Head & Co., citizens of the Territory of Arizona, and creditors of said respondent corporation to an amount barely in excess of five hundred dollars, to present to this Honorable Court a petition asking that said corporation respondent be adjudged an involuntary bankrupt, and in due course said Roland M. Hockaday was named as Trustee in Bankruptcy.

Knowledge of said insolvency proceedings was only communicated to and gained by affiant on February 11th, 1905, and the same was suppressed and concealed from him by his codirectors. That service of process of this Honorable Court on said petition, in pursuance of said conspiracy, was made on A. S. Kimberly, secretary of said corporation and one of said conspirators, who suppressed knowledge of such service and the institution of such proceedings from stockholders. That in pursuit of said conspiracy, said officers and directors refrained and caused attorneys who had acted for the corporation to refrain from making any defense to such application. Upon such application, the default of the respondent was entered and an adjudication in bankruptcy on default given, rendered and made. Thereafter and in further pursuance of said conspiracy,

an appraisement was made of the property of the company and the same was at the instance of said conspirators appraised at an approximate total of seventy-four thousand dollars. Thereafter in pursuance of said conspiracy, an order of sale of said property was set for hearing March 4, 1905; that of all the said proceedings affiant and the officers of the Howell Mining Company were in entire ignorance and were purposely kept so by the conspirators, and affiant was not apprised of the same until a few days before the 4th of March, 1905. Upon being apprised of the same, affiant applied for and obtained an order through counsel postponing the hearing of said application for the order of sale until the 25th day of March, 1905.

In further pursuit of said conspiracy upon a pretended notice to the directors of one day, said conspirators, viz., J. K. Burnham, A. S. Kimberly, T. P. Wallace and T. J Roberts, pretended to hold a meeting of the Board of Directors of said corporation in the city of New York on March 16, 1905, at which meeting affiant was present, but refused and declined to vote, and protested against the adoption of the resolution hereinafter referred to

At said meeting said directors proceeded to elect themselves as officers of said corporation for the next fiscal year. At said meeting, for the purpose of legally preventing said corporation from entering an appearance in and defending these bankruptcy proceedings, the said directors wrongfully declared by resolution that the proceedings in bankruptcy were for the best interests of said corporation and

the stockholders thereof, and was the most equitable method of selling the property of the corporation to pay its debts.

That in said resolution said directors failed to declare that said corporation was in fact insolvent. This affiant avers that at the time of the execution of said deed of trust, at the time of the filing of said petition in bankruptcy, and at each and all of said times the said corporation was, ever since has been and now is solvent and abundantly able to pay its debts; that the fair value as well as the original cost, of the trade fixtures of said corporation, upon its property in Yavapai County, Arizona, consisting of mining tools, supplies, machinery and buildings, exceeds $100,000, and that the actual value of its mines and mining property, estimated upon the recoverable value of the actual ore developed and in sight, in its mines, exceeds One million dollars.

That at divers and sundry times and at divers and sundry places, and during the years 1903 and 1904, the said conspirators, as officers and directors of said corporation, have given forth and maintained, having full knowledge of the facts that the property of said corporation, had and has a value exceeding Five millions of dollars, and that the said officers and directors have personally sold to divers and sundry persons, upon such representation of value, large blocks of the capital stock of said corporation, at a price of One dollar per share, for the benefit of the treasury of the corporation.

That affiant and said Howell Mining Company are creditors of said respondent corporation in large

amounts, upon provable debts and claims, based upon open book accounts, viz.: Howell Mining Company to an amount exceeding $4,000, upon an open account, showing such indebtedness upon the books of account of respondent corporation, for money advanced. The exact amount thereof is unknown to affiant, who is unable to specify the exact amount, the said books being in the possession of said conspirators. Said respondent is indebted to affiant in the sum of $5,000, due him for services as general manager, upon an express contract, the amount of which said corporation agreed to pay, but which has not been paid. Said corporation is further indebted to affiant upon an open account relating to the management of the business of said corporation and his disbursements of money in and about said business, while general manager, and during the year 1904, the balance upon which in favor of affiant will exceed the sum of $4,000, over and above all offsets and counterclaims, which is due, owing and unpaid.

That affiant as president of the Howell Mining Company, and on his own behalf, as creditors of said respondent, and as stockholders of said respondent, and for the benefit of all other stockholders who may desire to join herein, has fully and fairly stated to counsel, viz., Hon. Thomas Fitch and Francis Fitch and Hon. Robert E. Morrison, the facts of the case and all the facts relating to the affairs of said corporation and said conspiracy, and said deed of trust, and these proceedings in bankruptcy, and is by them advised and verily believes, that as such creditors and on behalf and for the benefit of said corporation as

stockholders, these petitioners have and can and will maintain a good and sufficient defense to the allegations and issues set forth in the original petition for an adjudication in bankruptcy filed herein.

BEN BLANCHARD.

Sworn to and subscribed before me, a notary public, of the County of Queens, in the State of New York, duly commissioned and sworn, my certificate being duly filed in the Offices of the County Clerk, of the Counties of Queens and New York, in the State of New York. The foregoing affidavit consisting of 10 pages were subscribed and sworn to before me, person and personally, by the said Benjamin Blanchard, this March 18th, 1905.

Witness my hand and notarial seal this March 18th, 1905.

[Notarial Seal] HENRY I. NEWELL,
Notary Public, Queens Co., N. Y.

Certft. filed in N. Y. County. Certft. filed in N. Y. County.

[Exhibit "A"—Deed of Trust, Dated November 4, 1904, Between The American Copper Co. and Rollins M. Hockaday.]

American Copper Company
to
R. M. Hockaday, Trustee.

This deed of Trust, made and entered into this fourth day of November, 1904, by and beteween The American Copper Company, a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona (hereinafter called Com-

pany), the party of the first part, and Rollins M. Hockaday, Trustee, of Kansas City, Missouri (hereinafter called Trustee), party of the second part.

Witnesseth: The party of the first part, in consideration of the debts and trust hereinafter mentioned and created, and the sum of One Dollar ($1.00) to it paid by the party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain, and sell, convey and confirm unto the party of the second part, all and singular the following described real estate and mining property situate, lying, and being in the Big Bug Mining District, in the County of Yavapai, in the Territory of Arizona, to wit:

Those certain mining claims and premises known as the Western Copper, Bonanza, Sure Thing, Eastern Copper, Copper Chief, Iron King, Lime Rock, Copper Platter, Copper Prince No. 1, Copper Prince, Copper Mount, Copper Van, Copper Prince No. 2, New Road, Copper Reade, Copper Peach, Copper Princess, Copper Road, Copper Dyke and Copper Produce, lode mining claims, designated by the Surveyor General as Lot Number 1714, embracing a portion of sections fifteen, sixteen, twenty-one, twenty-two and twenty-eight, in Township Thirteen North of Range One East, Gila and Salt River Meridian, United States Patent whereof is dated the 16th day of May, 1904, and of record in Book 69 of Deeds, pages 178 to 191, Records of Yavapai County, Arizona, and for further full and particular description of said mines and mining claims, reference is hereby made to the said United States Patent and the said

record thereof, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all rights, privileges and franchises thereto incident; appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises and every part and parcel thereof, with the appurtenances. And also all mills, assay offices, machinery, pipe lines, pumping plant, and pumping station, property, hoists, mining implements, and property of every kind, character and description, owned, held, used and enjoyed in connection with the above-described mining property and premises. Also those three mining claims situate in the Agua Fria Mining District in Yavapai County, Arizona, known as the "Gold Flood" mining claim, notice of location whereof is in Book 69 of Mines, on page 471; "Gold Spring" mining claim, notice of location whereof is recorded in Book 69 of Mines at page 472; and the "Gold River" mining claim, notice of location whereof is recorded in Book 69 of Mines at page 473; same being records of the county recorder of Yavapai County, Arizona. And any and all other mines and mining rights owned by the party of the first part in Yavapai County, Arizona; and also all and singular the tenements, hereditaments and ap-

purtenances thereto belonging or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises, and every part and parcel thereof, and the appurtenances.

Also all personal property of every kind, character and description owned, used, had and held by said Company, in and upon any of the premises hereinbefore described, of every kind and character and description whatsoever. And it is covenanted and agreed that said personal property herein conveyed, or intended to be conveyed in all of the personal property owned by said company used in connection with the operation of said mines and mining claims in Yavapai County, Arizona; and it is hereby covenanted that the same shall be deemed real estate for all the purposes of this instrument, and shall be held and taken to be fixtures and appurtenances of the mortgaged premises and as a part thereof, and may be used and sold therewith.

The party of the first part hereby warrants the title to said property to be free and clear of all encumbrances of whatsoever character or kind, and covenants that it has good and perfect title to the property hereby conveyed.

TO HAVE AND TO HOLD the same with the appurtenances to the said party of the second part, and to his successor hereinafter designated and to the assigns of him and his successor forever, in trust however, for the following purposes:

Whereas, the said Company did at the date herein mentioned, make and deliver its certain promissory notes for the amounts as follows, to wit:

On June 9th, 1904, one promissory note, due October 9th, 1904, to Rice R. Miner, for $30,000.

One promissory note dated June 9th, 1904, to T. P. Wallace for $5,000, due October 9th, 1904.

One promissory note dated June 9th, 1904, to T. J. Roberts, for $5,000.00, due October 9th, 1904.

One promissory note of the said date, June 9th, 1904, to J. K. Burnham, due October 9th, 1904, for $5,000.

One promissory note dated June 9th, 1904, to the Burnham, Hanna Munger D. G. Co., for $5,000, due October 9th, 1904.

One promissory note dated June 28, 1904, to Faxon & Swofford, as trustees, due October 28th, 1904, for $12,500.

One promissory note dated June 28th, 1904, to Wm. Barton, due October 28th, 1904, for $2,500.

One promissory note dated September 15th, 1904, to Andrew Icken for $1,000 due December 15th, 1904.

One promissory note dated September 15th, 1904, to W. C. Taber, due December 15th, 1904, for $1,000.

One promissory note dated September 15th, 1904, to E. A. Fitter, due December 15th, 1904, for $1.000.

One promissory note dated September 15th, 1904, to F. H. Mattlage, due December 15th, 1904, for $500.

One promissory note dated September 15th, 1904, to O. A. VanDerlyn, due December 15th, 1904, for $500.

One promissory note dated September 15th, 1904, to W. E. Hollingshead, due December 15th, 1904, for $500.

One promissory note dated September 15th, 1904, to J. D. Pickles, due December 15th, 1904, for $500.

One promissory note dated September 15th, 1904, to A. S. Whitesell, due December 15th, 1904, for $500.

One promissory note dated September 15th, 1904, to J. Albert See, due December 15th, 1904, for $500.

One promissory note dated October 27th, 1904, to Faxon, Munger, Philbrook, Richards and Burnham, due December 27th, 1904, for $5,000.

One promissory note of even date herewith, due thirty days from date, to Thomas P. Wallace, for $1,000.

One promissory note of even date herewith to Thomas J. Roberts, due thirty days from date for $1,000.

One promissory note of even date herewith to J. K. Burnham, due thirty days from date for $300.

One promissory note of even date herewith to Burnham, Hanna, Munger D. G. Co., due thirty days from date for $7,500.

And one promissory note of even date herewith to Arthur S. Kimberly, due thirty days from date for $2500.

And thirty-two notes of even dates herewith for $1,000, each payable to bearer due on demand.

Each and all of said notes bearing interest at the rate of six per cent per annum from the date thereof.

Now, if the said note and interest thereon be paid when due, then these presents shall be void and the

property herein conveyed shall be released, at the cost of the party of the first part, but if default be made in the payment of said notes, or any part thereof; or any of the interest thereon when due, then all of the said notes shall become due and be paid as herein provided, and this deed shall remain in full force; and the said party of the second part or in case of his death, inability or refusal to act then the (then) Sheriff of the said County of Yavapai, Arizona (who shall thereupon become his successor in this trust for the purpose and objects of these presents, and with all the powers, duties and obligations thereof) may proceed to sell the property hereinbefore described and any and every part thereof, at public vendue to the highest bidder, at the north front door of the courthouse at Prescott, Arizona, in the County of Yavapai aforesaid for cash, first giving thirty (30) days public notice of the time, terms and place of sale, and of the property to be sold, by advertisement in some newspaper printed and published in Prescott, Arizona, which publication shall be at least once a week for four consecutive weeks next preceding such sale, and from time to time to adjourn such sale in his discretion and without further notice to hold such a sale or adjourned sale, and upon any sale or sales hereunder, to make, execute, and deliver to the purchaser or purchasers of the premises, estate, property, rights, and franchises so sold, a good and sufficient deed or deeds for the same which sale shall be a perpetual bar, both in law and in equity, against the American Copper Company, and all persons and corporations lawfully claiming

or to claim by, through or under it, and, upon the making of such sale the principal of all notes hereby secured and then outstanding shall forthwith become due and payable, anything in said notes to the contrary notwithstanding and upon the making of any such sale, the said Trustee shall apply the proceeds thereof as follows, to wit:

1. To the payment of the costs and expenses of such sale or sales, including a reasonable compensation to such trustee, his agents, attorneys and counsel, and all expenses, liabilities and advances made and incurred by such trustee in managing and maintaining the property hereby conveyed and all taxes and assessments superior to the lien of these presents.

2. To the payment of the whole amount of principal and interest which shall then be owing or unpaid upon the note secured hereby, without any preference or priority whatever whether the said principal by the tenor of said notes, be then due or yet to become due; and in case of the insufficiency of such proceeds to pay in full the whole, amount of such principal and interest owing and unpaid upon the said notes, then to the payment of such principal and interest pro rate, without preference or priority, but ratably to the aggregate amount of such principal and accrued and unpaid interest.

3. To pay over the surplus if any, to the American Copper Company, its successors or assigns.

All of the notes herein secured and above described shall stand upon a parity so that each holder thereof is alike secured pro rata by this instrument and no right of action shall exist in any holder of said notes

under this Deed of Trust, but all the rights under this deed, including that of foreclosure if desired to be exercised, shall rest exclusively in the trustee herein named or his successor. The trustee is hereby vested with discretion to determine whether the power of sale shall be exercised in case of default, but if he shall be required to sell under the terms of this instrument whenever a majority in amount of the debts secured hereby shall demand of him so to do.

The said party of the second part covenants faithfully to perform the duties herein created.

IN WITNESS WHEREOF, The said party of the first part has caused these presents to be signed by its President, and its corporate seal to be hereunto affixed, attested by its Secretary, being authorized so to do by resolution of its Board of Directors, and the second party has signed these presents, on the day and year first above written.

[Corporate Seal]

THE AMERICAN COPPER COMPANY,
By J. K. BURNHAM,
President.

ROLLINS M. HOCKADAY,
Trustee.

Attest: ARTHUR S. KIMBERLY,
Secretary.

State of Missouri,

County of Jackson,—ss.

Before me, Amy Z. Cruise, a Notary Public in and for said County and State, on this day personally

appeared J. K. Burnham to me known to be the President, and Arthur S. Kimberly, to me known to be the Secretary of the American Copper Company, a corporation, and each being by himself duly sworn did depose and says that he knew the corporate seal of said corporation, and that the seal affixed to said instrument was such corporate seal, and it was so affixed and the foregoing instrument executed by authority of a resolution of the Board of Directors of said corporation, and that he had signed his name thereto by like order; and they each acknowledged to me that said corporation executed the foregoing instrument for the consideration and purposes therein expressed.

Given under my hand and seal of office this 5th day of November, A. D. 1904.

[Notarial Seal] AMY Z. CRUISE,
Notary Public.

My commission expires August 10th, 1907.

State of Missouri,
County of Jackson,—ss.

Before me, Amy Z. Cruise, a Notary Public in and for said County and State, on this day personally appeared Rollins M. Hockaday, known to me as the person named in the foregoing instrument and acknowledged to me that he had executed same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 5th day of November, 1904.

[Notarial Seal] AMY Z. CRUISE,
Notary Public.

My commission expires August 10th, 1907.

Recorded at request of Hawkins, Ross & Anderson, Nov. 9, A. D. 1904, at 9:00 o'clock A. M., in Book 23 of Mortgages, pages 53-60, Records of Yavapai County, Arizona.

P. J. FARLEY,
County Recorder.
By M. B. Farley,
Deputy.

[Endorsed]: Filed at 9:30 o'clock A. M. Mar. 25, 1905. J. M. Watts, Clerk.

[Signed Order of District Court Dated December 19, 1905, Denying Application of Ben Blanchard and The Howell Mining Company to Vacate the Default of the American Copper Co., etc.]

In the District Court of the Fourth Judicial District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy.

In the Matter of THE AMERICAN COPPER COMPANY,

Bankrupt.

For the reasons stated in and in accordance with the decision of the Court this day filed the application of Ben Blanchard and Howell Mining Company, petitioning creditors of the American Copper Company, filed herein on the 25th day of March, 1905, praying that the default of the defendant, the American Copper Company, and the order entering the same, be vacated and set aside, and that the order or judgment herein declaring and adjudicating the American Copper Company, a bankrupt, and all subsequent orders relating thereto, and proceedings had

therein be set aside and vacated, and that any order heretofore made for the sale of the property of said alleged bankrupt or for a hearing thereon be vacated and set aside and to permit said petitioning creditors to intervene herein and to plead to the involuntary bankruptcy petition herein, and to file herein their answer and objections to said petition and to contest the same, and praying said petitioning creditors should be permitted upon the hearing or trial of their said petition to produce witnesses in court and examine them at such hearing or trial, and use their testimony thereat and therein, and to present at and in said hearing or trial such further or additional affidavits or proof as they may be advised in support of their said petition and in proof of the allegations contained therein, be and the same is hereby denied.

Done in open court this 19th day of December, 1905.

RICHARD E. SLOAN,
Judge.

[Minute Order Dated December 19, 1905, Denying the Application of Ben Blanchard and The Howell Mining Co. to Vacate the Default of the American Copper Co., etc.]

MINUTE ENTRY, DEC. 19, 1905.

For the reasons stated in and in accordance with the decision of the Court this day filed, the application of Ben Blanchard and Howell Mining Company, petitioning creditors of the American Copper Company, filed herein on the 25th day of March, 1905, praying that the default of the defendant, the American Copper Company, and the order entering

the same, be vacated and set aside, and that the order or judgment herein declaring and adjudicating the American Copper Company a bankrupt, and all subsequent orders relating thereto, and proceedings had therein be set aside and vacated, and that any order heretofore made for the sale of the property of said alleged bankrupt or for a hearing thereon be vacated and set aside and to permit said petitioning creditors to intervene herein and to plead to the involuntary bankruptcy petition herein, and to file herein their answer and objections to said petition and to contest the same, and praying that said petitioning creditors should be permitted, upon the hearing or trial of their said petition, to produce witnesses in court and examine them at such hearing or trial, and use their testimony thereat and therein, and to present at and in said hearing or trial such further or additional affidavits or proof as they may be advised in support of their said petition and in proof of the allegations contained therein, be and the same is hereby denied.

To which order and judgment of the Court the said petitioning creditors then and there in open court duly excepted.

[Certificate of Clerk U. S. District Court to Supplemental Transcript of Record on Petition for Revision.]

In the District Court of the United States for the Fourth Judicial District of the Territory of Arizona, Having and Exercising the Powers and Jurisdiction of a Court of Bankruptcy Under the Laws of the United States.

IN BANKRUPTCY.

In the Matter of THE AMERICAN COPPER COMPANY,

Bankrupt.

I, J. M. Watts, Clerk of the District Court of the United States for the Fourth Judicial District of the Territory of Arizona, having and exercising the Powers and Jurisdiction of a Court of Bankruptcy under the laws of the United States, do hereby certify that the foregoing and hereto attached is a full, true, and correct copy of the Petition of Ben Blanchard and Howell Mining Company, petitioning creditors, with exhibit thereto attached, the Order of the Trial Court dated December 19, 1905, and the Minute Entry of the same dated December 19, 1905, as the same appear in the files of my office.

Witness my hand and the seal of said Court this 10th day of February, A. D., 1910.

[Seal] J. M. WATTS,
Clerk.

[Endorsed]: No. 1722. United States Circuit Court of Appeals for the Ninth Circuit. Ben Blanchard and The Howell Mining Company, Stockholders of The American Copper Company, Petitioners, vs. G. W. Ammons, Brisley Drug Company et al., Creditors of The American Copper Company, Bankrupt, Respondents. In the Matter of The American Copper Company, Bankrupt. Supplemental Transcript of Record on Petition for Revision. Upon Petition for Revision Under Section 24b of the Bankruptcy Law of July 1, 1898, to Revise in Matter of Law the Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

Filed February 14, 1910.

F. D. MONCKTON,
Clerk.

No. 1722

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BEN BLANCHARD and THE HOWELL MINING COMPANY, Stockholders of THE AMERICAN COPPER COMPANY,

Petitioners,

vs.

G. W. AMMONS, BRISLEY DRUG COMPANY et al., Creditors of THE AMERICAN COPPER COMPANY, Bankrupt,

Respondents.

In the Matter of THE AMERICAN COPPER COMPANY, Bankrupt.

BRIEF OF PETITIONERS

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898, to Revise in Matter of Law the Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

JUORNAL-MINER PRINT

No. 1722

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vs.

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Respondents.

In the Matter of THE AMERICAN COPPER COMPANY, Bankrupt.

BRIEF OF PETITIONERS

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898, to Revise in Matter of Law the Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

STATEMENT OF CASE.

On January 24th, 1905, four creditors of the American Copper Company (an Arizona

corporation), whose claims amounted to $554.32, filed a petition in the Fourth District Court of Arizona Territory in bankruptcy, asking that the company be adjudged a bankrupt. (P. R. p. 9.)

The said petitioning creditors represented "that said the American Copper Company is "insolvent, and that within four months next "preceding the date of this petition, said "the American Copper Company committed "an act of bankruptcy in that it did hereto-"fore, to-wit, on the 4th day of November, "A. D. 1904, by a certain trust deed (P. R. "p. 34), make a general assignment of all of "its property to one R. M. Hockaday, in "trust for the benefit of its creditors."

Service of process of the said creditors' petition was made on A. S. Kimberly, secretary of the American Copper Company, who suppressed knowledge of such service, and the institution of such proceedings from stockholders. The officers and directors of the corporation refrained and caused attorneys who had acted for the corporation to refrain from making any defense to the cred-

itors' application, and upon such application the default of the company was entered and an adjudication in bankruptcy on default was made on the 7th day of February, 1905. (P. R. p. 16.)

The capital stock of the American Copper Company consists of five million shares. Of these there were one million, three hundred thousand shares in the treasury of the company as treasury stock, which was donated to it by the Howell Mining Company. The Howell Mining Company owns over two and one-half million shares, Benjamin Blanchard 31,000 shares, J. K. Burnham 41,000 shares (33,000 of which he received for consenting to act as president), Arthur S. Kimberly 250,000 shares, the other directors 161,100 shares, and over 650,000 shares of the stock donated by the Howell Mining Company is held by stockholders, hundreds in number, resident in widely separated parts of the United States, who paid to the company for the same over four hundred thousand dollars, which was expended in the development and betterment of the mining property of

the company and the erection and maintenance of machinery and ore reduction works.

Knowledge of the adjudication in bankruptcy was first communicated to Benjamin Blanchard and to the Howell Mining Company, petitioners herein, on February 11th, 1905, and on the 23rd of March, 1905, they applied to the Fourth District Court of Arizona Territory, in bankruptcy, as stockholders of the American Copper Company, owning more than a majority of its issued stock, for an order setting aside the adjudication of bankruptcy. (P. R. p. 17.)

As grounds in support of this application they assigned:

First. That at and prior to the time of filing the petition in bankruptcy of January 24th, 1905, by the four creditors of the American Copper Company it was and ever since has been and still is solvent.

Second. That the petition of said creditors does not allege any act of bankruptcy, for the instrument in writing alleged in said petition to be an act of bankruptcy was not a general assignment for the benefit of cred-

itors, but a trust deed giving a preference to certain creditors.

Third. That the trust deed was made, the filing of the petition in bankruptcy was induced, and the adjudication by default obtained, and an order of sale of the property of the company procured in pursuance of a fraudulent conspiracy entered into by J. K. Burnham, the president of the American Copper Company; Arthur S. Kimberly, its secretary, and certain of its directors, owning altogether less than one-tenth of its capital stock, for the purpose of obtaining the property of the company for one-twentieth of its value, and defrauding the holders of two-thirds of its issued stock of their holdings.

On May 24th, 1905, a demurrer to this petition was filed by the attorneys for some of the creditors of the company. (P. R. p. 44.)

Nine causes of demurrer were assigned, but the principal one was "That said petition "fails to show any wrong or injury to said "petitioners, or either of them, either com-"pleted or threatened, for which reason they

"have no standing in equity." (P. R. p. 47.)

On the 27th day of April, 1909, the Judge of said Court filed his order denying the petition of Ben Blanchard and Howell Mining Company, stockholders of said bankrupt, petitioners herein, and ordering the same dismissed.

In said order the Court adopted the decision and findings theretofore filed by him, in the matter of the petition of Ben Blanchard and Howell Mining Company, as creditors of said bankrupt, and which said decision and findings will be found on page 52, Exhibit "E," of the Petition for Review herein.

To which order and ruling of the Court your petitioners thereupon excepted and thereafter filed this petition for revision on June 7th, 1909, in the office of the Clerk of this Court.

ASSIGNMENT OF ERROR.

The order and judgment entered in said cause on the 27th day of April, 1909, denying your petitioners' application is erroneous and against the just rights of said petitioners, for the following reasons:

First. Because said order is contrary to law.

Second. Because the Court by his findings found that the trust deed referred to as the ground of bankruptcy in the petition for involuntary bankruptcy herein was not a general assignment for the benefit of creditors, thereby finding that the said bankruptcy court had no jurisdiction to enter the order of adjudication herein.

Third. The Court erred in denying said petitioners' application for the reason that the said Court found as a fact that the said alleged bankrupt was at the time of the institution of these proceedings, insolvent; the Court not having granted these petitioners the right to introduce testimony in support of their allegation in their petition that the said American Copper Company was solvent at the date of the filing of the petition in bankruptcy herein.

Fourth. For the reason that the bankruptcy court in denying your petitioners' application, decided this case upon the merits without granting to the petitioners herein

the right of a trial and the presentation of evidence in support of their petition, the case standing, at the time of the Court's decision, upon the petition of your petitioners and a demurrer to the same.

Fifth. For the reason that the Court, having found that the trust deed heretofore mentioned was not a general assignment for the benefit of creditors, and that being the only act of bankruptcy described in the petition in bankruptcy, the Court should have granted a trial to your petitioners and permitted them to answer the petition in bankruptcy as filed in this cause.

Sixth. For the reason that the Court had no right in considering this petition to find that the American Copper Company was insolvent at the date of the institution of the proceedings herein, but should have granted these petitioners a hearing upon the merits upon this subject.

Seventh. For the reason that the Court in bankruptcy, having found that the defects in the petition in involuntary bankruptcy could be cured by amendment, had no right to find

as it did that the result on a hearing of such amendment would be the same, because the American Copper Company has never in these proceedings had an opportunity to introduce a defense upon a charge of insolvency, the allegation in the petition in involuntary bankruptcy that the bankrupt was insolvent being immaterial, for the reason that the act of bankruptcy charged was that of a general assignment for the benefit of creditors.

Eighth. For the reason that the American Copper Company, the alleged bankrupt, has been denied the right of a trial by the Court or by a jury, of the question of its solvency at the time of the institution of these proceedings.

Ninth. The Court erred in holding as follows:

> "While, therefore, the specific act of bankruptcy complained of by the petitioning creditors is not shown to have been committed, it does appear that another act of bankruptcy was, by said conveyance, committed by

> the corporation. The variance is one which may be cured by amendment. The showing, therefore, appears to the Court to be insufficient for the vacation of the default and the setting aside of the judgment of adjudication, inasmuch as it would be unavailing to the petitioners, Blanchard and the Howell Mining Company, for the reason that by an amendment made to the creditors' petition another judgment of like effect to the former would be entered upon the hearing of the same."

Because a default was suffered by the alleged bankrupt to be entered herein upon the charge that an act of bankruptcy had been committed and an order of adjudication was entered herein pro confesso. But it does not appear from the record that, had insolvency been presented as an issue, a default would have been allowed or suffered to be taken. That at the time the order denying these petitioners' application herein was made, such an amendment as is sug-

gested by the Court would have presented an entirely new and vital issue to be tried, to-wit: the solvency of the alleged bankrupt at the date of the filing of the petition in involuntary bankruptcy.

Tenth. For the reason that the bankruptcy court had no right to find that the alleged bankrupt was insolvent at the date of the institution of these proceedings, because the alleged bankrupt has never in these proceedings had an opportunity to be heard in its own defense on the question of solvency.

Eleventh. For the reason that the record in this case does not show that the alleged bankrupt was insolvent at the date of the institution of these proceedings.

Twelfth. Because the petition in involuntary bankruptcy herein did not present for consideration or decision the question of the solvency of the American Copper Company, but only the question of whether or not the trust deed described in said last mentioned petition was a general assignment for the benefit of creditors, and any amendment of

said last mentioned petition alleging that said trust deed was a preference would present a new cause of action which the American Copper Company would have the right to defend.

Thirteenth. Because the order of adjudication herein was not supported by the allegations of the petition in involuntary bankruptcy.

Fourteenth. Because the finding of the bankruptcy court in denying the petitioning stockholders' application is not supported by the record or any evidence in this cause.

Fifteenth. Because the order herein complained of overruled the demurrer herein and thereupon an issue of fact was presented which should have been set down for hearing.

Sixteenth. Because the bankruptcy court, having found that the act of bankruptcy alleged in the petition in involuntary bankruptcy had not been committed, it was clearly the duty of the bankruptcy court to grant the prayer of the petitioning stockholders and set aside the order of adjudication and default of the alleged bankrupt here-

tofore entered herein; and if the petitioning creditors for bankruptcy amend their petition herein, that the bankrupt or these petitioning stockholders be permitted to answer the same.

ARGUMENT.

There is only one Assignment of Error in this case and it is the foregoing:

The allegations of petitioners, admitted by the demurrer, show that the directors and officers of the corporation, "in pursuance of "a fraudulent conspiracy, caused the peti- "tioning creditors to join in and cause to be "filed the involuntary petition in bank- "ruptcy." "It is a serious question whether "a petition in bankruptcy, filed by the cred- "itors of a corporation at its request, can be "maintained."

In re Hale, 107 Fed. Rep. 432.

It was the duty of the Judge of the Fourth Judicial District either to have sustained this demurrer or to have overruled it. It was, according to the rules of pleading, a confession by the creditors that the American Copper Company was not insolvent, that it

had not made a general assignment for the benefit of its creditors, and that its default and the adjudication of bankruptcy made thereon were obtained by a fraudulent conspiracy of the holders of one-tenth of its capital stock to despoil the holders of the other nine-tenths of their property. It was unaccompanied by any affidavit denying the truth of the allegations made by Blanchard or the Howell Mining Company. It was an admission that notwithstanding these allegations there was no showing made that under the bankruptcy law would warrant the court in setting aside the adjudication of bankruptcy.

If Judge Sloan had overruled the demurrer, as we submit it was his duty to do, he could have protected the rights of the creditors by giving them the privilege of filing an answer to the petition of the Howell Mining Company and Mr. Blanchard, and proceeding to a trial of the issues made.

But the Judge as shown by his decision pursued the extraordinary course of passing over the demurrer and deciding on the mer-

its without hearing evidence, without an answer, without according the Howell Mining Company and Blanchard a day in court or an opportunity to be heard, or any issue of fact being joined.

Judge Sloan first says: "The specific act "of bankruptcy complained of by petitioning "creditors is not shown to have been commit-"ted," and then he says, "if the adjudication "in bankruptcy should be set aside the cred-"itors could amend their petition so as to al-"lege another and a different act of bank-"ruptcy from that alleged in the original "petition."

The Judge finds warrant for this ruling in the fact that the instrument in writing upon which the adjudication in bankruptcy was made, although not a general assignment, such as would warrant an adjudication in bankruptcy whether the company was insolvent or not, was yet a preferential assignment such as would warrant such an adjudication if the company WAS insolvent when it was made.

And then the Judge proceeds to find as a

fact that the company was insolvent. He says: "The proceedings in the case, and the "record before the court, show that "the American Copper Company was, "at the time of the institution of "these proceedings, insolvent." And he further says that "if it did not appear that "the American Copper Company was insol-"vent * * * the court would feel that it "was in duty bound to set aside the order "of adjudication."

No evidence is in the record, and none was ever offered anywhere, to show that the company was insolvent. The only allegation to that effect will be found in the creditors' petition, where it is contained in the words, "the American Copper Company is insolvent, "and within the next four months preceding "the date of this petition committed an act "of bankruptcy by a certain trust deed mak-"ing a general assignment of all its property, "etc."

If it had been true that the company made a general assignment, that would have been an act of bankruptcy whether it was insol-

vent or not; the allegation of insolvency would have been surplusage and no proof of such insolvency required in order to warrant an adjudication of bankruptcy.

But if the allegation of having made a general assignment could by an amendment of the creditors' petition, made after judgment, have been altered so as to allege a preferential assignment, then proof of insolvency would have been necessary and a default—especially a default fraudulently obtained—does not supply such proof.

A bald allegation of insolvency without any statement of the facts constituting such insolvency, is insufficient, but even if sufficiently pleaded, still the allegation that the company was insolvent when the trust deed was executed is not sustained by any evidence whatever, and it cannot by a default be taken as true and confessed. Because of absence of an answer and appearance the court has no right to make an adjudication of bankruptcy without requiring evidence to support the creditors' petition, even in a case where the default was not fraudulently ob-

tained.

In an involuntary proceeding in bankruptcy, where the bankrupt appears and answers, the creditors must prove the act of bankruptcy as charged. Their obligation to make such proof exists equally in case of a default. Allegations in a pleading are never taken as true, even in cases of default, except under statutory provisions which dispense with proof in some cases, such as actions on express contracts of a certain character. The court has no jurisdiction to render an adjudication of bankruptcy without the production of proof of the allegations of the petition. And it will not be presumed that such proof was given when the record itself shows to the contrary.

The record in this case shows that no proof was offered of the alleged insolvency of the company. It also shows that the only proof that may be assumed to have been submitted of the alleged act of insolvency was the deed of trust, which not only fails to prove but which disproves the allegation that the company made a general assignment, and that

was the only act of bankruptcy assigned in the creditors' petition.

There is grave doubt as to whether the deed of trust may be considered even as a preferential assignment, and whether, even if the company had been insolvent, it was an act of bankruptcy. It appears by the affidavit of Mr. Blanchard, which has not been controverted, that the trust deed was executed and delivered without the consent, knowledge or approval of the majority of the stockholders of the company, and without authority from any stockholders' meeting. It appears that its issuance was a piece of trickery executed as the first step in a conspiracy having for its object the fraudulent obtainment of the holders of one-tenth of the capital stock of the property of their associates.

Judge Sloan assumes that the variance between the specific act of bankruptcy complained of by the petitioning creditors and another act of bankruptcy not alleged is a variance that can be cured by amendment.

In this we submit that Judge Sloan erred.

Variance between the allegations and the proof are of two kinds, immaterial and fatal. The former may be cured by amendment; the latter cannot be so cured. An immaterial variance does not draw from the substance of the allegations, but differs only in minor details. A fatal variance is an absolute want of proof of the allegations. If the petition charges a cause of action based on contract and the proof supports only a right of action founded on tort, there is a total failure of proof to support the allegations.

If the secretary of the American Copper Company had disclosed instead of concealing the service on him of the creditors' petition in bankruptcy, the company under the pleadings would have been legally justified in disregarding the summons, for it knew that it had not made a general assignment and would have had the right to presume that the court would deny the petition on failure of the petitioners to substantiate their allegation. But with an amended petition averring that the company was insolvent and had made a preferential assignment, it would de-

volve upon the company to deny the insolvency and show that the preferential assignment was invalid and fraudulent.

Fraud vitiates all transactions and a court —especially a court of equity, will not refuse relief where fraud is charged under oath, and its perpetrators deny it not, but seek immunity under the shelter of a demurrer.

A bankruptcy court, though not strictly an equity court, proceeds on equitable principles.

Subdv. 2, bottom page 343, 22d Enc. Pl. & Pr., and authorities cited.

of Law, and authorities cited.

In proceedings in involuntary insolvency against a corporation it is necessary in order to give the court jurisdiction, to allege and prove—that the corporation is insolvent, and that it has committed an act of bankruptcy, except where the act of bankruptcy consists of a general assignment, and then insolvency is immaterial. Where it is immaterial it is surplusage, and may be disregarded.

Section 3, Bankruptcy Act;

174 U. S. 590;

2 Am. B. Report, 463.

Where an allegation of insolvency is necessary it is insufficient to allege merely—as is alleged in this case—that the corporation is insolvent. It should be stated either that the corporation has "admitted in writing its 'inability to pay,' or that it "is unable to pay 'its debts in due course.' "

Section 3, Bankruptcy Act.

In a petition in bankruptcy the facts essential to jurisdiction should be affirmatively and distinctly alleged.

104 Fed. Rep. 967.

There should be allegations of fact made with reasonable and sufficient certainty.

Page 345 vol. 22, Enc. Pl. & Pr., and authorities there cited.

Issuable facts must be alleged and not mere conclusions in the general language of the bankruptcy act.

Page 345, vol. 22, Enc. Pl. & Pr., and authorities cited.

The form of the petition in bankruptcy is not prescribed by the statute, but by the rules of the Supreme Court, which plainly

require the facts to be stated. The statute contemplates that a trial by jury may be had upon the allegations of the petition in case the debtor so chooses, and this shows the necessity of alleging issuable facts and not mere conclusions.

98 Fed. Rep. 76.

The petition should allege the acts of insolvency on which the petition is based.

The evidence must be limited to the facts alleged in the pleadings.

Subdv. 3, bottom page 653, vol. 16, Am. & Eng. Cyclodedia.

An allegation merely that the corporation is insolvent is an allegation of a conclusion of law. It does not apprise the corporation of the nature of the act of which it is accused. It is as if a complaint should state that the defendant is indebted to the plaintiff in so much money, without stating how the indebtedness arose, whether on a promissory note, or for money loaned, or for goods sold and delivered.

As the act of bankruptcy alleged in this case is that the corporation "committed an

"act of bankruptcy in that it did heretofore, "to-wit, on the 4th day of November, A. D. "1904, by a certain trust deed, make a gen- "eral assignment of all of its property to one "R. M. Hockaday, in trust for the benefit of "its creditors," it follows that the bald allegation that "the corporation is insolvent" was surplusage and should be disregarded altogether.

It appearing by the record that the instrument designated in the creditors' petition was not a general assignment for the benefit of all creditors but a trust deed to secure certain creditors, and was so held by the District Court of the Fourth Judicial District of Arizona, it follows that—there being no sufficient allegation of insolvency—that District Court never acquired jurisdiction of the subject matter.

The demurrer of the respondents in this case, admits for the purposes of this case, the truth of the allegation of the verified petition and the truth of the affidavit of Blanchard filed in support thereof, to the effect that the corporation is not and never was insolvent.

that it has never made a general assignment for the benefit of its creditors; that it has never admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground and that the bankruptcy proceedings were inaugurated and carried on in pursuit of a fraudulent conspiracy of certain officers of the corporation to obtain its property.

The learned judge of the said Fourth District says in his opinion that "the proceedings in the case and the record before "the court show that the American Copper "Company was at the time of the institution "of these proceedings insolvent." There is nothing in the record to sustain this assertion of the judge. The petitioning creditors do not show such insolvency even inferentially. Each of them alleges a certain sum to be due to him. None of them says that he has demanded payment, or that the corporation is unable to pay. The only "proceedings" or "record in the case," from which it is assumed by the trial judge that the corporation is insolvent, is the bald and imma-

terial allegation to that effect, and the record shows that the adjudication of bankruptcy was made upon default and without proof of any kind.

The trial judge gives as his reason for refusing to set aside the adjudication in bankruptcy that it would not, if set aside, avail Blanchard and the Howell Mining Company because it appears that "another act "of bankruptcy than that alleged in the cred- "itors' petition was committed by the cor- "poration." And that this variance could be cured by amendment.

But the "other act of bankruptcy" referred to not being such an one as will warrant an adjucation of bankruptcy, unless it should first be alleged and proved that the corporation was insolvent, it follows that there is nothing in the creditors' petition now to give the court jurisdiction and that the petition would have to be amended so as to allege both insolvency and an act of bankruptcy, or, in other words, amended so as to now give the District Court a jurisdiction which it did not possess at the time of the original adjudi-

cation.

An amendment going to the jurisdiction cannot be allowed.

Federal cases Nos. 12061, 7303 and 3317.

We submit that the decision of the Fourth District Court should be reversed, the default and order of default and judgment declaring and adjudicating the American Copper Company a bankrupt and all subsequent orders relating thereto and proceedings had thereunder and any order or orders made herein for the sale of the property of said alleged bankrupt and all sales made of said property thereunder be vacated and set aside and the proceedings in bankruptcy be dismissed.

Respectfully submitted,

E. S. CLARK,

ROBT. E. MORRISON,

Attorneys for Appellants.

No. 1722

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BEN BLANCHARD AND THE HOWELL MINING COMPANY, Stockholders of THE AMERICAN COPPER COMPANY,

Petitioners,

vs.

G. W. AMMONS, BRISLEY DRUG COMPANY, et al., Creditors of the American Copper Company, Bankrupt,

Respondents.

In the Matter of The American Copper Company, Bankrupt.

BRIEF OF RESPONDENTS.

JNO. J. HAWKINS,
JOHN MASON ROSS,
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PRESCOTT COURIER

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BEN BLANCHARD AND THE HOWELL MINING COMPANY, STOCKHOLDERS OF THE AMERICAN COPPER COMPANY,
Petitioners,
VS.
G. W. AMMONS, BRISLEY DRUG COMPANY, ET AL., CREDITORS OF THE AMERICAN COPPER COMPANY, BANKRUPT,
Respondents.

In the Matter of **The American Copper Company,** Bankrupt.

BRIEF OF RESPONDENTS.

Statement of Case.

For various reasons which amply appeared from the record, the respondent creditors herein have no substantial interest in this proceeding. This brief and the motions heretofore made by respondents are filed by them for the purpose of bringing to the attention of this Honorable Court the true status of this proceeding. Except for this desire to aid the Court in the consideration of this matter, re-

spondents might with entire propriety ignore this whole proceeding.

From petitioners' statements and allegations, and from the record of the proceedings in the lower Court, which record we assume will be before this Court upon the considerations of this matter, we select certain salient and noteworthy facts.

On January 25th, 1905, certain creditors of The American Copper Company filed a petition in involutary bankruptcy against that company in the District Court of the Fourth Judicial District of the Territory of Arizona.

> "Thereafter proper service was had upon the American Copper Company." (P. R., p. 2).

No defense was interposed by the Company, and an adjudication in bankruptcy was made on the 7th day of February, 1905.

Petitioners learned of the bankruptcy proceedings on February 11, 1905 They waited until claims had been proven and allowed against said bankrupt in the sum of upwards of One Hundred Twenty Thousand ($120,000) Dollars, until a Trustee had been elected and had petitioned the Court for an order of sale for the property of the bankrupt. Thereupon, on March 25th, 1905, petitioners applied to

the bankruptcy court for an order setting aside the adjudication of the bankruptcy.

Petitioners purported to appear in the lower court in two capacities; first, as alleged creditors of The American Copper Company; second, as holders of a majority of its issued stock. A separate petition was filed in each of these behalfs. These petitions were identical in substance.

The petition in which they appeared as stockholders is set out as Exhibit "C" to the petition for review (P. R. p. 16). It does not vary from the petition in which they appeared as alleged creditors, except in the bare allegation contained in Paragraph III, that petitioners are stockholders of The American Copper Company. In lieu of this allegation, the so-called creditors' petition sets up that petitioners are creditors of The American Copper Company in the total sum of Thirteen Thousand ($13,000) Dollars.

The two petitions were supported by the same affidavit which appears on pages 23 et seq. of the petition for revision herein. They complain of exactly the same transaction alleged, the same grounds for relief and pray for the same relief, and "were heard by the Court together." (P. R., p. 50). It is impos-

sible for us to concede that the transaction complained of entitled petitioners herein to split up their alleged wrongs into two causes of action; and entitled them if they should be defeated in the cause of action thereafter to prosecute the other. After filing their objection to the adjudication in bankruptcy, we find that on the 29th day of June, 1905, petitioner Blanchard becomes one of the purchasers at the Trustee's sale of the property of The American Copper Company. The Howell Mining Company recorded its objections to the sale to Messrs. Blanchard and Fitch. These objections were overruled, but the purchasers failed to complete the purchase. A re-sale was ordered over the objection of the defaulting purchasers and the property sold, the sale confirmed, the purchase price paid and distributed among the creditors of The American Copper Company. All of these proceedings were had with the full knowledge of petitioners herein, who, at various times, took formal exceptions to the proceedings and such exceptions overruled.

On December 19, 1905, the trial court rendered its decision (P. R., p. 52 et seq.) denying the application of petitioners to intervene; and the order of April 27, 1909, shows

that both of said petitions were passed upon by the Court and denied. (P. R., p. 50, et seq). In fact all the issues before the Court were decided and determined on December 19, 1905.

Petitioners prosecuted an appeal and petition for review to the Supreme Court of the Territory of Arizona, complaining of the decision of December 19, 1905, and upon such appeal they presented and fully argued their alleged rights both as creditors and as stockholders, making no distinction between them and making no suggestion that the lower court had not passed upon both petitions alike. In support of this assertion, we refer the Court to the petition mentioned in Exhibit "E" to the petition for review. The petitioners carefully omit that petition from their printed transcript, although it is referred to by the Court in the order Exhibit "E" complained of and said order is based thereon. That petition exhibits a brief filed by the petitioners herein in the Supreme Court of the Territory of Ariozna in which they fully argue the rights of stockholders of The American Copper Company to be heard in opposition to the bankruptcy proceedings.

By careful selection and elimination, peti-

tioners have attempted to presnt this matter to this court upon a partial and incomplete record. We have suggested a diminution of the record in this case, and hope we may assume in our argument that the matter will not be determined except upon a view of the entire record.

On March 22, 1907, the Supreme Court of the Territory of Arizona dismissed the appeal and petition for review theretofore filed in said court by petitioners herein complaining of the order of the trial court dated September 19, 1905. (See in re American Copper Company, 89 Pac. Rep., p. 516).

It is found and declared by the trial court:

> "That the decision of the Court rendered on the 19th day of December, 1905, was intended by the court and did determine all issues of law presented to it by both of said petitions on behalf of Ben Blanchard and Howell Mining Company to the demurrers thereto, and said petition as stockholders has not been under advisement by this court since that time and was wholly decided by this court at that time; that from the date of said decision to the presnt time, no suggestion has ever been made to this court by counsel on either side that

anything remained in dispute in connection with said petitions or either of them. (P. R., p. 50-51).

On or about the 25th day of April, 1909, petitioners suggested to the trial court for the first time that they considered that the trial court had not yet ruled upon their petition wherein they appeared as stockholders. It was in response to this suggestion that the order of April 27, 1909, was ordered. A reading of the findings of fact in said order shows that it is in effect a nunc pro tunc order and it should have been so entered. A nunc pro tunc order can not be so entered for the purpose of giving a party the right to appeal. See West v. McLaughlin & Co.'s Trustee, 162 Fed., 124.

There parties if they were aggrieved should have taken their petition for review within a reasonable time after the 19th day of December, 1905.

It is now sought to bring before this court practically all of the creditors whose claims were proven and allowed against The American Copper Company in bankruptcy and among whom the proceeds of the bankrupt's property have been distributed. Petitioners seek to do this after a lapse of approximately

four years since said property was sold. They now ask that adjudication of bankruptcy be set aside, and all orders made subject thereto be vacated and annulled.

Is it supposed that by such a proceeding the property formerly held by The American Copper Company and now being owned and operated by a stranger to this proceeding will be returned to The American Copper Company? Is it intended that all of the creditors of The American Copper Company will be required to repay to the purchaser or to the court or to The American Copper Company the dividends which they have received from the bankruptcy court? What is to become of the One Hundred and Twenty Thousand ($120,000) Dollars of indebtedness of The American Copper Company, practically all of which is now barred by the Statutes of Limitation of the Territory of Arizona?

We assert that the entire record shows that petitioners herein bring this proceeding as an after thought, after having for years interpreted the trial court's decision of December 19, 1905, as a final decision upon all matters theretofore submitted to it.

Upon the consideration of the foregoing

matters, we submit that the petition for revision should be dismissed without further argument, but in order to make full presentation of all matters which we think entitled to consideration, we beg to suggest the following matters in opposition to said petition:

The following facts appear affirmatively from the petiton for revision herein:

1. That at the time of the institution of bankruptcy proceedings against The American Copper Company it was indebted in the sum of upwards of One Hundred Twenty Thousand ($120,000) Dollars. On November 4, 1904, said Company conveyed and transferred all of its property of every character to a trustee to secure the payment of certain designated creditors. This deed of trust did not mention or secure the claims of any of the petitioning creditors in bankruptcy. It did not mention or secure the claims of any of the following creditors who are mentioned in the proceedings: G. W. Ammons, Brisley Drug Company, F. W. Braun Company, Byron Jackson Machine Works, Corbin & Bork, Fairbanks, Morse & Company, Lee Fong, Ferrofix Brazing Company, A. J. Head, Hawkins & Ross, J. George Leyner Engineering Works, J. J. Murray, Meese & Gottfried Com-

pany, Martindell, Horne & Company, Prescott Title Company, Postal Telegraph Cable Company, Stetson - Preston Company, A. Schilling & Company, Lewin-Meyer Company, Valley Pride Creamery, Western Union Telegraph Company, Westinghouse Elec. Mfg. Company, Ben Blanchard, and The Howell Mining Company.

Petitioner Blanchard describes this trust deed as conveying all the property of the company to a trustee. Therefore, at the time the bankruptcy proceedings were instituted The American Copper Company was without property of any character except such equitable right as it had under said deed of trust. The petitioners in bankruptcy and many other creditors of The American Copper Company were wholly unsecured by that trust deed; under the bankrupt act, a person is deemed insolvent "whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

In view of this we can not understand the

persistent reiteration by petitioners of the assertion that The American Copper Company was solvent at the date of the institution of bankruptcy proceedings. This assertion runs through practically all of petitioners' assignments of errors. (See Assignments 3-6-7-8-9-10-11, P. R., p. 4 et seq.)

3. That at a meeting of the Directors of The American Copper Company held March 16, 1905, the directors declared by resolution,

> "That the proceedings in bankruptcy were for the best interests of said corporation, and the stockholders thereof and was the most equitable method of selling the property of the corporation to pay its debts." (P. R., p. 31).

4. That the property of the bankruptcy sold at public sale for slightly over one-half of the amount of its debts. Mr. Blanchard in his affidavit, states that the property of the company exclusive of ore values was worth upwards of One Hundred Thousand ($100,000) Dollars. He participated in a bid of One Hundred Fifteen Thousand ($115,000) Dollars for the property, but failed to complete his purchase or to pay any part of the purchase.

Supplementing the foregoing observations

upon the facts shown by the record we submit the following propositions as conclusive upon the law applicable to this proceeding:

I.

Petitioner's original application filed in the Court below was insufficient and demurrable under equity rule 94, U. S. Courts.

Petitioners attempt to proceed in the right of the American Copper Company, they hold a majority of the stock of the American Copper Company. In no respect is there an attempt to comply with the requirements of equity rule 94 of U. S. Courts. They have not attempted to exhaust their remedies within the corporation, although it appears that they are entirely able to control all of its corporate actions.

Foss v. Harbottle; II Hare 461;
Taylor v. Holmes, 107 U. S. 492;
McKee v. Chautauqua Assembly, 135 Fed. 536.
Hawes V. Oakland, 104 U. S. 450.

The mere fact that one holds the majority of capital stock of a corporation does not authorize him to prosecute or defend an action in behalf of the company. Equity rule 94 crystalizes the requirements of a petition in what is ordinarily known as a minority

stockholders' suit. The same remedy is not open to the holders of a majority of the capital stock of a company. They have an adequate legal remedy within the corporation itself.

Miller v. Murray, (Colo.) 30 Pac. 46;
Lewis v. Hammersmith, (Mo. App.) 68 N. E. 79.

II.

Petitioners in their petition fail to allege any fraud on the part of the petitioning creditors in bankruptcy, and fail to show anything which vitiates the bankruptcy proceedings instituted therein.

There is no suggestion anywhere in the record that the petitioning creditors in bankruptcy were parties to the fraud and conspiracy alleged of the officers and directors of the American Copper Company. There is no suggestion that the claims set out in their petition are not bona fide and fully owing from the American Copper Company. The respondent creditors herein have filed with the Referee their claims aggregating in the neighborhood of One Hundred and Eight Thousand Dollars, and these have all been allowed. There is no suggestion made by petitioners that any of these claims are ficti-

tious. The full effect of all of their allegations on this point is that the bankruptcy proceedings were caused to be instituted by certain officers and stockholders of the American Copper Company, not made parties while the company was solvent, and in the absence of any act of bankruptcy committed by it. We will discuss hereafter the question of the solvency of the company and its commission of an act of bankruptcy, and confine ourselves now to a discussion of the effect of bankruptcy proceedings instituted against a corporation at its suggestion.

An agreement by a debtor to withdraw his opposition to bankruptcy proceedings and submit to a decree and permit his estate to be disposed of in the course of law is not a fraud upon the bankruptcy act.

Sanford vs. Huxford, 32 Mich., 315;
20 Amer. Rep., 653.

Where petitioning creditors, to have a corporation adjudged a bankrupt, institute such proceedings in order that all the creditors should share equally in the bankrupt's estate, and to this end pay its debts, and to this end obtained the consent of the corporation to declare its inability to pay its debts, and express a willingness to be adjudged a bank-

rupt, such creditors were held not estopped to urge the corporation's resolution as an act of bankruptcy on the ground of collusion.

In re Moench, 123 Fed., 965.

The Court said in the latter case:

> "The adjudication will operate to the benefit of all. Every creditor of the alleged bankrupt is as much a party to the proceding as are the petitioners. The estate must, after adjudication, be distributed for the benefit of all."

The fact that a debtor secures the co-operation of creditors by his own solicitation to unite in an involuntary petition in bankruptcy against him is not a fraud on the bankruptcy act.

In re Duncan, F. C. 4131.

It appears from Blanchard's affidavit (P. R., p. 28), and from the trust deed (P. R., p. 38, that the Directors of the American Copper Company charged by petitioners with fraudulent conspiracy, etc., were all large creditors of the American Copper Company. Petitioners say that the bankruptcy proceedings were caused to be instituted by these officers and directors. This was the condition in In re Rollins Gold & Silver Mining Company, 102 Fed., 982, where the court said:

"The present proceedings were brought by three creditors, two of whom were assignees of debts due officers or directors of the company, and it is contended that the proceedings were brought with the connivance of the officers of the company, and for some purposes of their own. There is no proof that these particular claims were not valid debts of the company, but the contention is that they were assigned without consideration, and for the purpose of bringing these proceedings. I do not think the question of the jurisdiction of the court depends in any way on the objects and purposes of the creditors in bringing the proceedings, or that they acted with the knowledge and consent of officers and directors of the company. Assuming the jurisdictional facts to exist, the creditors may be directors or stockholders of the company, and in one sense their action in bringing involuntary proceedings against the company would be to allow the company to avail itself of the benefits of the act, but I do not think this alone any objection or that it is prohibited by the statute."

It is no objection to proceedings in bank-

ruptcy that they were instituted by the creditors upon the promise of the bankrupt to pay them in full.

Wallace vs. Lumis, 97 U. S., 146.

The trust deed which was relied upon as an act of bankruptcy was filed for record November 9, 1904. On January 25, 1905, nearly three months after the recording of the trust deed, the petition in bankruptcy was filed. Meanwhile, every one of the notes secured in the trust deed had matured and become payable according to their terms, excepting the demand notes. The trust deed provided that, if the notes, or any of them, were not paid when due, they should all thereupon become due, and the trustee might in his discretion proceed to sell all of the properey described in the trust deed in the manner therein set forth and apply the proceeds to the payment of costs and expenses of the sale, and of the trust, to the payment of the whole amount of all of the notes mentioned in the trust deed. During all of this intervening time no step was taken by any stockholders of the American Copper Company questioning the validity of this trust deed. The petitioners herein appear to have kept silent, although having full knowledge of the trust deed. The time

would shortly lapse within which bankruptcy proceedings could be instituted. We submit, therefore, that the record abundantly establishes that the bankruptcy proceedings herein were instituted by the petitioning creditors in good faith, and upon reasonable grounds.

Of all the many creditors of the American Copper Company, not a single one has made any objection to the bankruptcy proceedings, excepting some of the stockholders of the company.

> "It is not within the contemplation of the statute," says the court, in re Billing, 145 Fed., 402, "when the debtor is, in fact, insolvent, and has committed an act of bankruptcy, to give to the creditor the right to contest the adjudication, merely to keep alive a lien or levy, which would be destroyed if the petition be not defeated; for that is contrary to the spirit and purpose of the bankruptcy law. The contest of the petition for the latter purpose is an abuse of the statute. So long as he appears within the time prescribed by law the creditor may wage his contest as to the insolvency and the act of bankruptcyfi whatever his ulterior motive; but when, as here, it is not de-

nied that the bankrupt was insolvent, and has committed an act of bankruptcy, a creditor who has not appeared within the time prescribed by law ought never afterwards to be allowed to assail the adjudication for anything short of fraud in its procurement, injurious to creditors generally, or for want of jurisdiction apparent on the face of the record."

III.

It appears upon the face of the record that Petitioners were guilty of laches in filing and prosecuting their petition in intervention, and that the rights of innocent persons have attached.

The bankruptcy petition was filed in the lower court January 25, 1905. Petitioners herein filed their petition in intervention March 25, 1905, two months after the petition in bankruptcy had been filed. The only excuse alleged for their delay is found in the affidavit of Benjamin Blanchard in these words:

"Knowledge of said insolvency proceedings was only communicated to and gained by affiant on February 11, 1905, and the same was suppressed and concealed from him by his co-directors; that

service of process of this Honorable Court on said petition, in pursuance of said conspiracy, was made on A. S. Kimberly, Secretary of said Corporation, and one of said conspirators, who suppressed knowledge of such service and the institution of such proceedings from stockholders." (P. R., p. 30).

Affiant further says:

"Thereafter, in pursuance of said conspiracy, an order of sale of said property was set for hearing March 4, 1905; that all of said proceedings affiant and the officers of The Howell Mining Company were in entire ignorance, and were purposely kept so by the said conspirators, and affiant was not apprised of the same until a few days before the 1st of March, 1905. Upon being apprised of the same, affiant applied for and obtained an order, through counsel, postponing the hearing of said application for the order of sale until the 25th day of March, 1905." (P. R., p. 31).

That is to say, petitioners had actual knowledge of the bankruptcy proceedings on the 11th of February, 1905. They did nothing until they found that the property had been

ordered sold, which was, of course, the natural and probable result of bankruptcy proceedings, which they should have anticipated when they learned that the proceedings had been instituted.

It has been repeatedly held that the filing of a petition in bankruptcy operates as a lis pendens or attachment, and is notice to all the world.

Bank vs. Sherman, 101 U. S., 403.

Mueller vs. Nugent, 184 U. S., 14.

The bankruptcy statute makes no provision for service of process upon creditors.

> "In proceedings in bankruptcy, an adjudication, and necessarily an implied judgment that the court has jurisdiction, follow upon filing of a petition. No notice is necessary that the adjudication will be made. After an adjudication, by notice, creditors become parties; and if they do not, they are precluded."

In re Mason, 99 Fed., 256.

The adjudication of bankruptcy herein was made February 7, 1905. Blanchard had actual knowledge of the proceedings February 11, according to his own statement. Before he made his affidavit, it appears that the Trustee in bankruptcy had been elected by the

creditors of the company, appraisement of the property had been made and the property ordered sold. In a similar state of facts the Court In re Billings 145 Fed., 395-404, the Court said:

> "If this creditor ever had the legal right to put the other creditors to delay and expense by insistence upon his legal right to oppose adjudication, in order to save preferences by defeating the petition, it was incumbent upon him to see to it that his right was promptly asserted, in the time and mode prescribed by law, before the adjudication was made. A creditor cannot sit still until an adjudication is made, if he might have obviated it by timely objection, and then complain of an unrestricted adjudication, which can not now be undone, without prejudice to the bankrupt estate, and rights which have grown up on the faith of the adjudication and the orders made thereunder."

See also In re Worsham, 142 Fed 121 (C. C. A., 8th Circuit).

Under such a proceeding as this, where it is sought to have an adjudication of bankruptcy set aside, the rights of creditors who

have proven their claims, and of those who have acquired rights upon the faith of the proceedings, will be considered and protected.

In re Duncan, F. C., 4131;
In re Sheehan, F. C., 12,732;
In re Neilson, F. C., 1090.

In the latter case the adjudication was had on November 6, and the petition in intervention filed November 9 was dismissed.

The finding of the trial court that from December 19, 1905, until in April, 1909, neither petitioners nor their counsel ever suggested anything remained under sumbission or undisposed of in relation to the American Copper Company (P. R., p. 51,) shows such inexcusable laches and acquiescence as wholly bars petitioners from now prosecuting this proceeding. When we consider further that petitioners have participated in the proceedings leading up to the sale of the bankrupts' property; have objected to such sale and allowed the order of sale to become final as to them; have trifled with the Bankruptcy Court by bidding in the property at Trustee's sale and, failing to complete the purchase, have required a re-sale to be made, the frivolity of this proceeding becomes manifest, and when

we find petitioners arguing to the Supreme Court of the Territory their right to a hearing as stockholderh and find them three years later urging the trial court to separately rule on their so-called "Stockholders' Petition" for the reason that it has remianed under submission and undecided during that time, it becomes too plain for argument that this whole proceeding is the result of after-thought produced by the discovery that the Supreme Court of Arizona had no jurisdiction to relieve petitioners when in 1906 they carried to that Court the same complaint now brought to this Court.

The trial Court has found that the decision of December 19, 1905, "did determine all issues of law presented to it by both of said petitions in behalf of Ben Blanchard and Howell Mining Company. Petitioners should at that time have prosecuted their petition for review to this Court.

Plymouth Cordage Co. vs. Smith, 194 U. S., 311;

Ex Parte Stumpff, 60 Pac., 96;

Re American Copper Co., 89 Pac., 516.

Instead of doing so they prosecuted an ineffective appeal and petition for review to the

Supreme Court of Arizona. It is now too late to petition this Court.

Loveland, Bankruptcy, 2nd Ed., 313;
Collier's Bankruptcy, 6th Ed., p. 305;
Re Thomlinson Co., 154 Fed., 834;
Re Grant, 143 Fed., 661.

In spite of petitioners' fine spun differentiation of their wrongs suffered on the one hand as creditors and on the other as stockholders, all of which we submit is wholly unsupported by reason or authority, it is obvious that there is not a single argument or proposition urged in their behalf as stockholders which night not be equally urged in their behalf as creditors.

IV.

It appears from the record that it would have been a useless thing to set aside the adjudication of bankruptcy and permit petitioners to contest the petition in bankruptcy, because the American Copper Company would necessarily have been adjudicated bankrupt in the end.

It is an elementary rule that equity will not open a judgment, except upon a showing of a meritorious defense to the original action, that is to say: If it appears from the record that no other or different judgment would be

entered in the end, a court of equity will not do a useless thing in opening the judgment. We deem it unnecessary to cite authorities for this proposition. In underlies the decision given by the court below in this case. We submit that it appears plaintly from the record in this case, that, if the adjudication of bankruptcy had been set aside and petitioners permitted to prove all that they alleged, the American Copper Company must have been again adjudicated bankrupt.

Petitioners complain repeatedly of the finding of the lower court as follows:

> "The proceedings in the case and the record before the court below show that the American Copper Company was at the time of the institution of these proceedings insolvent. The only question for determination is whether or not the record shows that an act of bankruptcy had been committed within four months prior to the filing of creditors' petition."

Counsel say:

> "No evidence is in the record, and none was ever offered anywhere to show that the company was insolvent." (Petitioners' Brief, p. 16).

When we examine the original petition

filed by petitioners, we find that it affirmaatively alleges that the American Copper Company was insolvent at the date of the filing of the bankruptcy proceedings. The trust deed attached to the petition as an exhibit purports to be a conveyance and transfer of all of the company's real and personal property for the purpose of securing certain creditors therein named. Blanchard says, "This trust deed was given for the avowed purpose of depriving said company of its property." (P. R., p. 28). He describes it as "Assigning and conveying the property of the company to a Trustee" (id.). In other words, it is admitted by petitioners, and apepars conclusively in the record otherwise, that this trust deed transferred the entire assets of the company.

Among the creditors secured by name in the trust deed, we do not find either Blanchard or Howell Mining Company mentioned. Many of the creditors respondent herein, as we have shown above, were not mentioned in the trust deed. Thus, it appears from petitioners' own allegations that at the date of the filing of the petition in bankruptcy the company was absolutely without assets of any character, and was indebted to many persons,

including petitioners. Does it require any argument to show that the company was insolvent when the bankruptcy proceedings were instituted?

Therefore, we say that it appears uncontradicted that the trust deed above mentioned constituted another and different act of bankruptcy from that alleged in the petition, namely, a conveyance and transfer of all of the property of the company with the intent to hinder, delay or defraud some of its creditors. (Section 3, Bankruptcy Act). This is the direct holding of the court in Rumsey & Sikemier Co. vs. Novelty Machine Mfg. Co., 99 Fed., 699, where a conveyance of all of the property of a debtor to a Trustee for the equal benefit of all of his creditors was held to be a transfer of its property with intent to hinder, delay and defraud creditors, because its necessary operation would be to deprive the creditors of the rights, advantages and safeguards provided for them by the bankruptcy law. The reasoning in that case is so clear, that we quote from it:

> "The next question is whether the deed is a conveyance by the company with intent to hinder, delay and defraud its creditors, or any of them. It is contended

that because it devoted all the debtor's property to the payment of its creditors' demands, pro rata and equally, and because thereis no fraud of the kind requisite to avoid deeds at common law, or under the statutes of fraudulent conveyances, therefore this deed does not hinder, delay or defraud creditors within the meaning of the bankruptcy act. In considering this question, it must be borne in mind that the bankruptcy act confers certain peculiar rights and privileges upon creditors which were unknown to the common law, and unrecogonized by state statutes concerning fraudulent conveyances. Among these are the right (1) to choose their own Trustee; (2) to examine the bankrupt; (3) to have notice of all the important steps in the administration of the estate; and (4) to have the assets converted into money and distributed under the supervision and control of a court of bankruptcy. Any course of procedure by an insolvent, like that resorted to in this case, whe reby he conveys all his property to some Trustee of his own selection, with power to dispose of it according to his own judg-

ment, and with none of the safeguards provided by the bankruptcy act, clearly deprives the creditors of the valuable rights accorded to them by that act."

Clearly, and by much stronger reason, the trust deed in this case, which conveyed all of the property of the American Copper Company to a Trustee for the benefit of a portion of its creditors, constitutes a transfer of the company's property with intent to hinder, delay or defraud some of its creditors, at least those not mentioned in the trust deed. Where such an act of bankruptcy is alleged, it is only necessary that the company appear to be insolvent when the petition is filed (Bankruptcy Act, Sec. 3-C).

See also, Re Salmon & Salmon, 143 Fed., 399.

The lower court held that the proceedings in the case and the record before the court showed that the company was bankrupt when the petition was filed. The record before the Court showed claims allowed in the aggregate of about $120,000. It showed an appraisement of the bankrupt's property at $75,000, and a sale of the property made and confirmed for $75,000. Clearly then the Company was insolvent not only when the bankruptcy pro-

ceedings were filed but also when the trust deed was made. Therefore, if the trust deed were not a general assignment it was either a conveyance while insolvent with intent to prefer, or a conveyance to hinder, delay or defraud creditors and the lower court was entirely correct in holding that if the adjudication were set aside, the petitions could have been amended to charge the trust deed as constituting such other acts of bankruptcy, and the same adjudication would have been re-entered.

Re Mureur. 95 Fed., 634;
Re Henderson, 9 Fed., 196;
Re Hark, 142 Fed., 279; 146 Fed., 665;
Re Lange 97 Fed., 197;
Re Wright Lumber Co., 114 Fed., 1011.

Moreover, by the affirmative showing in Blanchard's affidavit these bankruptcy proceedings were approved by the Board of Directors of the Bankrupt as for the best interests of the company and its stockholders and as the most equitable method of selling its property to pay its debts—(P. R., p. 31).

This resolution is not charged to have been adopted through fraud, conspiracy or improper design. It amply admits the insolvency of the company by approving the sale

of its property to pay its debts, and admits its willingness to be adjudged bankrupt, by approving an adjudication already entered. It also admits the inability of the Company to pay its debts. This makes the insolvency of the Company immaterial.

Re Duplex Radiator Co., 142 Fed., 906.

V.

The trial court proceeded correctly in entering the adjudication by default.

Counsel for petitioners strongly criticise the action of the lower court in making an adjudication of bankruptcy by default upon a petition verified by the affidavit of four creditors, and uncontroverted by any answer. Considerable space is taken up in their brief with this matter. However, the court simply followed its duty in the premises and the course laid down by the law. In re Billing, 145 Fed., 395, the Court says:

> "When an involuntary petition is filed and proper service is made upon the bankrupt, and there is no appearance by the debtor, or any of his creditors, the Court must thereupon either pass an adjudication of bankruptcy, or dismiss the petition. If the petition be unresisted, there is no question before the

court except as to the sufficiency of the petition. That raises an issue of law. It must be tested solely by the averments of the petition, **and the law does not permit, much less require, the taking of proof on such an issue.** When, as here, the petition is filed by the proper parties, in the proper district, and makes all the jurisdictional allegations, and is uncontested, the failure to contest the petition by any person having a right, so to to do, establishes the truth of the allegations of the petition. The law thereupon demands an adjudication of bankruptcy which, when thus rendered, is binding on all the world."

We are unable to understand counsel's persistent claim that the lower court overruled the creditors' demurrer to petitioners' petition. There is no warrant for such a contention. In opposition to the petition filed by petitioners in the lower court the respondent creditors herein, holding proved and allowed claims against the bankrupt aggregating One Hundred and Eight Thousand ($108,000.00) Dollars, filed their demurrer based upon nine different grounds. An examination of the demurrer reveals a number of grounds stated

therein, any one of which was fatal to the petition filed.

The order of the lower court sustained the demurrer by holding that there was no equity in the petition filed, and that there was no defense to the petition in bankruptcy. The Court's order was based upon the conclusion that it appeared from the record that even if the American Copper Company had not made a general assignment, as alleged in the petition in bankruptcy, it had by deed of trust mentioned in the petition, and exhibited by the petition for intervention, committed another and different act of bankruptcy which, if the adjudication were set aside and the matter reopened, could be alleged in an amended petition in bankruptcy and a new adjudication had. That the lower court was entirely right in its order, and in the conclusions upon which it is based, we have already shown.

Counsel argue that the allegation contained in the petition of bankruptcy, to the effect, "That said American Copper Company is insolvent," pleads a conclusion of law.

Referring to official form Three prescribed by the Supreme Court, we find the exact

wording of the petition in bankruptcy herein as follows:

> "And your petitioners further represent that said ....., is insolvent, etc."

Therefore, if we have been guilty of pleading a conclusion of law, it is certainly to be admitted that we have done it upon high authority. Moreover, the learned Judge in his decision below may have given the wrong reason for not allowing petitioners to intervene. There are numerous authorities holding that such a deed of trust is a general assignment for the benefit of creditors.

White v. Cotzhausen, 129 U. S., 343;
Davis v. Schwartz, 155 U. S., 641;
Anniston, etc., Mill Co., 125 Fed., 974;
Couts v. Townsend, 126 Fed., 249;
Day, etc., Hdwe. Co., 114 Fed., 834;
West Co. v. Lea, 174 U. S., 590;
Re Mayer, 98 Fed., 976.

The judgment by default is conclusive of all the facts alleged in the petition. The act of bankruptcy alleged was taken as admitted.

The Court was certainly without jurisdiction to allow Blanchard and The Howell Mining Co. as Stockholders of the Bankrupt to move to intervene.

Re N. Y. Tunnel Co., 166 Fed., 284.

VI.

Petitioners' rights and wrongs as stockholders are not divisible for purposes of separate action from their rights and wrongs as creditors.

The fundamental defect of the petition of application for review at this time is that the record shows that on December 19, 1905, according to their own admission, a full determination of all their rights as creditors was had. These parties did not have two separate causes of action—one as creditors, and one as stockholders, and, having exhausted their remedy as alleged creditors and having failed within a reasonable time to petition this court for a review of same, they are bound by the determination of the lower court.

Watkins vs. Amer. Nat. Bank, 134 Fed., 36;

Brown vs. Amer Nat. Bank, 132 Fed., 450.

They are estopped by judgment.

Linton vs. Nat. Life Ins. Co., 104 Fed., 584.

Aetna Life Ins. Co., vs. Board of Com'rs., 117 Fed., 82.

Petitioners under the National Bankruptcy

Act were not qualified to intervene and set aside an adjudication; the only persons so qualified are either the bankrupt or a creditor with provable claim. In support of this proposition we refer to:

Nat. Bankruptcy Act, par. 18b and 59f.
Re Columbia Real Estate Co., 101 Fed., 956; 112 Fed., 643.

The judgment against the bankrupt by default is conclusive as any other.

Re Amer. Brew. Co., 112 Fed., 752.

A creditor can only be permitted to intervene after adjudication by consent of the court.

Neustadter Dry Goods Co., 96 Fed., 830.
Re Bush, F. C. 2222.
Re Mut. Merc. Agency, 111 Fed., 152.

The bankruptcy court derives its jurisdiction from the National Bankruptcy Act which does not provide for the intervention of stockholders either before or after adjudication, and we respectfully submit that the stockholders of the corporation adjudged to be a bankrupt, if they have any rights at all, their rights are either within the corporation or by bill in equity, joining all parties in in-

terest as defendants, especially the parties charged with fraud, in an action to set aside the judgment of adjudication.

Respectfully submitted,

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Attorneys for Respondents.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

BEN BLANCHARD and THE HOWELL MINING COMPANY, stockholders of the American Copper Company,
Petitioners,

AGAINST

G. W. AMMONS and BRISLEY DRUG COMPANY, *et al.*, creditors of the American Copper Company, Bankrupt.
Respondents.

IN THE MATTER

OF

The AMERICAN COPPER COMPANY,
Bankrupt.

1722

On Petition for Revision

Brief of the American Copper & Gold Company, an amicus curiæ, filed under leave of Court, in opposition to the Petition for Revision.

Statement.

This is a petition filed in this Court by Ben Blanchard and the Howell Mining Company as stock-

holders of the American Copper Company, bankrupt, to review an order of the District Court of the Fourth Judicial District of the Territory of Arizona, denying an application made by said Blanchard and the Howell Mining Company for an order setting aside the order of adjudication of bankruptcy entered against the American Copper Company, and refusing them leave to intervene for the purpose of contesting the adjudication of said company as a bankrupt.

Notice of the petition for revision was given to the attorneys for various creditors who had opposed the said application for leave to intervene. Neither the bankrupt, the trustee in bankruptcy, nor the purchaser of the property of the bankrupt sold by the trustee in bankruptcy at judicial sale, was cited to appear before this Court. The American Copper & Gold Company, on application to this Court, was granted leave, in view of the fact that it is the present owner of the property, formerly belonging to the bankrupt and so sold by the trustee, to appear as an *amicus curiæ* in opposition to these proceedings and to file a brief.

Before proceeding to a discussion of the questions of law that may be involved in the petition for revision, we shall submit a chronological statement of the various steps that were taken by the parties interested in this bankruptcy proceeding, as shown by the records in this Court.

Facts.

November, 1904. The American Copper Company executed a deed of trust to Rollins M. Hockiday, trus-

tee, conveying all of its property to said Hockiday to secure the payment of a number of promissory notes aggregating $121,100 (pp. 12; 28–29; 34–44; 53).

November 9th, 1904. Deed of trust recorded by County Recorder of Yavapai County, Arizona, in Book 23 of Mortgages, pages 23–60 (pp. 34–44).

January 25th, 1905. Petition filed in the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, by the Prescott Electric Company of Yavapai County, Arizona, R. H. Burmister & Sons Company of Prescott, Arizona; C. R. Martindale and E. J. F. Horn, doing business as Martindale, Horn & Company, of the same place, and A. J. Head, also of Prescott, Arizona, creditors of said American Copper Company, alleging that the American Copper Company was insolvent and had within four months prior to the filing of the petition in bankruptcy committed an act of bankruptcy by the execution of the said trust deed; that said deed was a general assignment for the benefit of creditors, and praying for the adjudication of the American Copper Company as a bankrupt (pp. 9–15). These proceedings were instituted in a court which had jurisdiction to entertain them; over a corporation which was amenable to the service of process within the jurisdiction of the court; the requisite number of creditors having the necessary amount of claims against the corporation joined in the petition; the corporation was engaged in mining and was, therefore of a class which, by the provisions of the Bankrupt Act, could be declared a bankrupt; and all of the neces-

sary jurisdictional allegations were contained in the petition.

February 7th, 1905. Order of adjudication entered by the Hon. Richard E. Sloan, Judge of the Territorial District Court, after proper service had upon the alleged bankrupt, which did not answer the petition (pp. 2–3, 16).

February 11th, 1905. Knowledge of bankruptcy proceedings communicated to and gained by Ben Blanchard, one of the petitioners herein and president of the other petitioner, the Howell Mining Company (p. 30).

February 7th to March 4th, 1905. Referee in bankruptcy appointed. Meeting of creditors called and held; Rollins M. Hockiday elected trustee in bankruptcy and application for sale of property made returnable March 4th, 1905 (pp. 30–31).

March 4th, 1905. Blanchard applied for and obtained an order postponing the hearing of the application for a sale of the property until March 25th, 1905 (p. 31).

March 16th, 1905. Meeting of directors of American Copper Company held in New York and attended by Ben Blanchard. Resolution adopted over opposition of Blanchard declaring that proceedings in bankruptcy were for the best interests of the corporation and the most equitable method of selling its property to pay its debts (pp. 31–32).

March 25th, 1905. Petitions as stockholders and creditors respectively of Ben Blanchard and Howell Mining Company for setting aside the default and the

order entering the default of the American Copper Company and for other relief, filed in the office of the Clerk of the Territorial District Court (pp. 16–34).

May 24th, 1905. Motions to strike and demurrers to stockholders' and creditors' petition filed by various creditors having provable claims against the bankrupt, aggregating $108,000 (pp. 44–50).

August 28th, 1905. Ben Blanchard, one of the petitioners, had bid for the property of the bankrupt at the judicial sale thereof by the trustee in bankruptcy, but having failed to conform to the requirements of the order of sale, the property was again offered by the trustee in bankruptcy at public auction, pursuant to the order of the Bankruptcy Court, and upon such sale was sold to Rice R. Miner for $75,000 cash on August 28, 1905, from whom the American Copper & Gold Company derives its title. (Petition of American Copper & Gold Co.)

December 19th, 1905. Decision of Hon. Richard E. Sloan, Judge of the Territorial District Court, denying application of Blanchard and Howell Mining Company, filed in Clerk's Office (pp. 52–55). Minute entry of the same made on the records of the District Court of the Fourth Judicial District of the Territory of Arizona (pp. 50–51); (Exhibit A attached to petition of American Copper & Gold Company).

March 19th, 1907. Motions to dismiss the appeal and the petition filed by Ben Blanchard and Howell Mining Company for review of the order made and entered on December 19th, 1905, granted by the Supreme Court of the Territory of Arizona in an opinion

written by Kent, *C. J.*, and concurred in by the associate justices (Exhibit B attached to petition of American Copper & Gold Company).

April 27th, 1909. Order entered by Hon. Richard E. Sloan, Judge of the Territorial District Court of Arizona, to review which the petition of Blanchard and the Howell Mining Company is filed in this court.

June 7th, 1909. Petition for review filed in this Court. This petition, it may be noted in passing, is not verified by one of the petitioners nor by either of their attorneys, but by one Allen Hill, who says he is their agent and that he verified it because the petitioners are absent from the Territory of Arizona, though how this can be possible with respect to the Howell Mining Company, which is a corporation organized under the laws of the Territory of Arizona (p. 24), is not apparent, nor is any allegation contained in the affidavit of verification as to the manner in which the affiant acquired knowledge of the facts sufficient to make the affidavit (see Loveland on Bankruptcy, 3d Ed., 908).

We shall discuss two propositions of law in this memorandum in the following order:

1. The petition to review should be dimissed for laches on the part of the petitioners.

2. The petition to review should be dismissed because the petitioners as stockholders of the bankrupt corporation had no standing either to contest the adjudication or to review the order refusing to allow them to intervene for the purpose of contesting the adjudication.

POINT I.

This Court should refuse to disturb, at this late day, on the application of Blanchard and the Howell Mining Company, proceedings which for more than two years they had allowed to stand unquestioned, and under which property rights have been obtained by numerous stockholders of the new company and other innocent parties scattered throughout the United States, which rights would be impaired by any reopening of the proceedings.

The American Copper & Gold Company took title to the property sold by the trustee in bankruptcy in September, 1905. This title was confirmed by the proceedings and order of the District Court for the Territory of Arizona, and no attempt was made either by Blanchard or the Howell Mining Company to restrain the trustee from disposing of the property or enjoining or postponing the sale. On the contrary, Blanchard himself, when the property was first offered for sale, was the highest bidder for it, but failed to comply with the requirements of the order of sale. Since acquiring title to the property the new company has expended large sums of money in improvements and betterments, and its stock and obligations representing moneys invested and borrowed for the purpose of such improvements and betterments have found their way into the hands of many hundreds of purchasers, who are widely scattered throughout the

United States. It can readily be seen that the successful operation of this company will be hindered, a cloud cast upon its title, the company subjected to embarrassment, the value of its securities greatly diminished and its future success jeopardized if the proceedings which are the foundation of its title to all its property and which have stood unchallenged for more than two years, long past the time when appeal proceedings could be taken, are now permitted to be reopened.

The laches of the petitioners should not find any favor in the eyes of this Court because of the petitioners' disingenuous endeavor to hide behind what they claim to be a distinction between the petition they filed as creditors and the same petition they filed as stockholders. These petitions are identical in every respect, both of allegation and form; they were filed by the same petitioners, Ben Blanchard and the Howell Mining Company; they were filed in the same court on the same day; were considered, argued and decided together; they raised the same questions in the same manner and were disposed of at one time, and yet the petitioners boldly make the following assertion before this Court:

> "Let it be clearly understood that the petition for revision herein is not in any way based upon the creditors' petition above mentioned, but is based upon a *stockholder's* petition in no way connected with the *creditors'* petition, but is an independent proceeding" (Par. II of Answer of Blanchard and the Howell Mining Company to the petition of the American Copper & Gold Company).

It is manifest that Blanchard and his corporation could have no greater or different rights in connection with a review of the order of adjudication as stockholders than they had as creditors. The same questions were involved in the determination of each petition, and it is misleading or at least untruthful to say or to imply that a decision against the latter has no connection with or binding effect upon the former.

The laches of these petitioners dates from a time long in advance of the last two year period of inactivity after the decision of the Supreme Court of Arizona. On February 11th, 1905, Ben Blanchard, according to his own affidavit (p. 30), knew of the bankruptcy proceedings and of the order of adjudication that had been entered on the default of the corporation. He waited until the 25th day of March following before he made any move to contest the order of adjudication or to show that he disapproved of the bankruptcy proceedings. In the meantime an application for sale of the property had been made and he had secured an adjournment of the sale and subsequently attended a directors' meeting, doubtless for the purpose of reaching some settlement favorable to himself to be worked out through the medium of the bankruptcy proceedings. When the property was first offered for sale he was the successful bidder, thus attempting to secure title to the property through these very bankruptcy proceedings, which, after this long lapse of time, he now seeks to have set aside and declared null and void. When the property was sold to the person who transferred title to the American

Copper & Gold Company, he took no steps to have the sale enjoined or postponed nor did he ever file security with the Court to obtain a *supersedeas* in connection with the various proceedings had in the Territorial District or Supreme Courts. After this petitions were dismissed in the District Court of the Territory of Arizona, his attorneys filed petitions for review and took an appeal to a court that had no jurisdiction in the premises and, after that court had dismissed the appeal proceedings for a fundamental lack of jurisdiction, he sat idly by for more than two years and then sought to have a determination reviewed which was really passed upon in December, 1905, three years and four months before. We submit that this is the extreme of laches, especially in a bankruptcy proceeding where the law demands despatch in the administration of estates. Estates in Bankruptcy are required to be promptly administered. Short periods of limitation for the filing of claims or taking of appeals and all proceedings in review of orders, short notices to creditors and prompt disposition of all contested questions are the means by which the law seeks to secure for creditors of a bankrupt an early distribution among them of the property of their insolvent debtor.

The petitioners insist that they are not prosecuting an appeal from the order of December 19, 1905, but we cannot conceive how Blanchard and the Howell Mining Company could have two separate, distinct and independent rights to contest the same question, viz.: the validity of the adjudication in bankruptcy of this company. They could only assert their claim once;

they might assert it as stockholders, if this Court so hold, or they might assert it as creditors, or they might assert it as stockholders and creditors, but they cannot assert it twice, once as stockholders and another time as creditors. It having been passed upon once, any order that the Court entered then must be held to have been a complete adjudication upon the question litigated before the Court and brought before the Court by them in either or both capacities. Such a decision was rendered on December 19th, 1905. An appeal was taken and determined in March, 1907. No order entered thereafter by the Territorial District Court of Arizona could reinaugurate that proceeding or start the time for taking an appeal from the determination of the Court running anew. This Court is virtually called upon to review an order of the Territorial District Court of Arizona made on the 19th day of December, 1905, three years and four months prior to the institution of these proceedings for revision.

It is true that the revision purports to be of an order that was made in April of this year and that the District Judge says that it is not entered as a *nunc pro tunc* order, but it certainly can be nothing else because it is based upon a determination of the Court which was entered of record and which the Court itself says determined the entire matter on both petitions. The Judge of the District Court of Arizona expressly says that his purpose in entering the order under review is to supply any deficiency that may exist in the minute entry of December 19th, 1905, which, if it "does not, in form and ef-

fect, dispose of the application to set aside the adjudication of bankruptcy heretofore made in these proceedings, as prayed for in both said petitions, then such failure and omission to dispose of both said petitions were the result of inadvertence and mistake" (p. 51). Certainly no one can claim the benefit of such inadvertence and mistake who has not been injured thereby, and, manifestly, in view of the appeal taken by Blanchard and the Howell Mining Company from the order entered on December 19th, 1905, they were not injured by the inadvertence of the Court in making this minute entry. The order sought to be reviewed, therefore, was in reality entered on December 19th, 1905. The entry in the minute book on that date was the judgment of the Territorial District Court of Arizona on the question litigated by Blanchard and the Howell Mining Company in both or either capacity, and from the date of that entry their right to appeal began to run.

> "It is the record of the judicial decision or order of the Court found in the record book of the Court's proceeding which constitutes the evidence of the judgment, and from the date of its entry in that book the Statute of Limitations begins to run."
>
> Polleys *v.* Black River Co., 113 U. S., 81, 84.

When the time for taking an appeal from the order of December 19th, 1905, had expired, it was not within the power of the District Court for the Territory of Arizona to arrest or call it back by any such order as

is sought to be reviewed in this case, whether the District Judge calls it a *nunc pro tunc* order or not. An order that is entered three years and four months after the determination of the Court and the entry of its judgment is certainly nothing else than a *nunc pro tunc* order, and declaring that it is not a *nunc pro tunc* order cannot alter the fact that it is a *nunc pro tunc* order. The laches of the petitioners cannot be excused or the right of appeal extended by any philological contradiction or verbal legerdemain.

> "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court such as entering an order *nunc pro tunc*."
>
> Credit Co. *v.* Ark. Central Ry. Co., 128 U. S., 258.

Assuming, therefore, that the petitioners had any separate standing as stockholders in the Court below, this Court has no jurisdiction now to review the order, because more than six months has elapsed since the judgment of the lower Court was made and entered of record.

In re Youngston, 153 Fed. Rep., 198.

POINT II.

As stockholders of the bankrupt the said Blanchard and the Howell Mining Company had no right under the Bankruptcy Act to ask the Court below to vacate the adjudication.

The Bankrupt Act provides that the alleged bankrupt and creditors having provable claims against the alleged bankrupt are the persons who may oppose a petition for adjudication. This has been construed to exclude all others.

In re Columbia Real Estate Co., 101 Fed. Rep., 965;
On appeal, 112 Fed. Rep., 643;
In re N. Y. Tunnel Co., 166 Fed Rep., 284.

We have received no copy of the brief filed in this court by the petitioners for review and have no knowledge or intimation of their exact position other than the statement thereof contained in their answer to our petition to intervene in this court as an *amicus curiæ*. From that we infer that the petitioners concede the principle decided in the foregoing cases and that under those decisions they are excluded from any right to intervene as stockholders merely in the right of stockholders, but their claim is that they have a right to intervene in the right of the American Copper Company, the bankrupt itself, by reason of the fact that the American Copper Company was in control of directors hostile to the petition-

ers, who conspired among themselves to have these proceedings in bankruptcy brought against the company, and thereupon to fail to make the defense which the company could have made to such proceedings; that in the case of such a conspiracy and fraud on the part of the management of the company, the petitioners would ordinarily have the right as stockholders to intervene for the purpose of defending any suit against the corporation in the place and stead of the corporation, and, therefore, they would have the same right in any proceeding in bankruptcy to intervene in the case of like conduct on the part of the management of the company for the purpose of defending the proceedings in its right and stead.

But one of the essential conditions necessary to the assertion of this right by stockholders is the necessity of showing some injury to the corporation from the acts complained of. We may concede that the principle would apply in the case of a corporation which refused to defend bankruptcy proceedings the same as it does in ordinary cases, but it is well established in such cases that where the acts complained of are within the power of the management of the corporation, the complaining stockholders must show that the corporation has been or will be injured thereby.

Am. & Eng. Enc. of Law, 2d ed., Title Stock and Stockholders, pp. 973, 974, 976, 980, 984.

The record in this case shows that the action of the management of the company, in refusing or neglecting

to defend against the bankruptcy proceedings, was not injurious to the company. In the decision filed by the District Judge, by which he disposed of the petitioner's application to intervene, he makes the express finding that the company was insolvent (p. 53), and, although he holds that the act of bankruptcy charged was not a general assignment for the benefit of creditors and, therefore, that the corporation could have successfully defended the petition as it then stood, yet he also holds that upon an amendment of the petition charging the execution of this trust deed as a preference, there could be no successful defense to the proceedings and the corporation would certainly be adjudged a bankrupt. That is to say, the neglect or refusal of the management of the corporation to defend that petition according to the finding of the District Judge did not in anywise enure to the injury of the corporation. The corporation would have been adjudged a bankrupt whether it had appeared and defended the proceedings or not. Of course, the allegations of conspiracy and fraud charged in the intervening petition of these petitioners for review and in the affidavit of Ben Blanchard were all before the District Judge when he made this decision and were passed upon by him as matters of fact. It must be assumed that, in addition to his express findings, he found against the petitioners upon these allegations and held the action of the management of the corporation to have been in entire good faith. This Court cannot review findings of fact of the District Judge upon a petition to review, under Section 24 of the Bankruptcy Act.

There is another condition, quite as pertinent to

the present case, upon which this stockholder's right depends and that is that the stockholder himself must be free from laches and must not have acquiesced or participated in the acts of the management of the corporation of which he complains. We think the conduct of Ben Blanchard from February 11th to March 25th, 1905, was such laches, participation and acquiescence in the action of the corporation whereby no defense was made to the proceedings in adjudication, and the property was sold and administered in the bankruptcy proceedings, and, no doubt, this conduct was also considered by the Court below in passing upon his application to intervene.

Am. & Eng. Enc. of Law, 2d Ed., p. 985.

The petitioners therefore had no standing in the Court below in the right of the alleged bankrupt corporation.

The allegations of the petition for review and of the affidavit of Ben Blanchard might also be construed to charge a conspiracy to impose a fraudulent proceeding upon the bankruptcy court by reason of the fact that it is alleged that the petitioning creditors were procured to file the petition for involuntary adjudication by the directors in control of the Company. But it has been decided that such action on the part of the Company is not such as to render the adjudication void.

In re Duplex Radiator Co., 142 Fed. Rep., 906;

In re Moench, 130 Fed. Rep., 685.

We have pointed out that the allegations of the petitioners for the adjudication were such as to confer jurisdiction upon the Court, and an adjudication entered upon such a petition, even if some of its allegations were not true, would not be void. The petitioners, therefore, had no standing whatever in the Court below, and certainly have none here.

In this petition for revision and in the petitioners' answer to our petition for leave to intervene in this Court, the proposition is made and repeated with some variety of assertion to the effect that the Court below in passing upon the application of Blanchard and the Howell Mining Company, tried the issues of fact that would have been raised by an answer to the petition for adjudication if such an answer had been allowed to be filed. And, "whoever heard of trying the issues of fact in a case upon demurrer"? etc. This also is specious and far-fetched. The Court below did not try the issues of fact that would have been raised in a contest of the adjudication any more than a court always must try or examine the merits of a proposed defense to any action upon an application of a party in default to open the default and make a defense. Such a party comes to the Court asking a favor and it is he himself that asks the Court to look into the merits of the defense he proposes to make, and to that extent to "try the issues." If he can thus satisfy the Court that he has a meritorious defense to make, his default is opened, but the burden is upon him to show that fact, and failing therein, his application is denied. That is what happened and all that happened

in this case in the Court below. These parties made their application long after the time prescribed by the bankruptcy act for the appearance of creditors in the proceedings to make defense to the adjudication. In order to move the favor of the Court it was necessary for them to show the Court as a matter of fact that they had a meritorious defense to make. They not only failed to do this, but the Court expressly found on the contrary, that the proceedings could not be successfully defended. This finding of fact cannot be reviewed by this Court upon a petition for revision under 24-*b* of the Bankruptcy Act.

POINT III.

An order of adjudication in bankruptcy made in February, 1905, should not be set aside or subject to attack on a petition for review filed in June, 1909, when rights have become vested under such order which will be disturbed by its vacation.

The maxim of the law which underlies all our statutes of limitations and the equitable doctrine of laches is based upon the ground of public policy "*interest rei publicæ ut sit finis litium.*" Let us consider for a moment the effect of overturning the adjudication entered in this proceeding.

The property of the bankrupt American Copper Company has been sold. It is a corporation with a naked existence, owning not a shred of property, real

or personal. The effect of a reversal of the order of adjudication would, therefore, be nugatory and vain and a useless exercise of judicial procedure unless the property formerly owned by the bankrupt were retransferred to it, which retransference, if possible at all, would be attended by incomprehensible difficulties.

If such a thing would be done, it would, in the first place, not only divest the American Copper & Gold Company of title acquired in the course of the bankruptcy proceedings but also destroy its title to all the betterments and improvements placed upon the property. It would therefore,

In the second place, destroy the value of its stock and securities, causing great loss to hundreds of innocent purchasers, and result in the loss of every dollar invested with or loaned to it. This is the necessary result, because,

In the third place, the American Copper Company cannot repay to the purchaser in the bankruptcy proceedings the moneys which the trustee has distributed in dividends to the creditors of that corporation, whose claims,

In the fourth place, have been satisfied and discharged by the receipt of the dividends paid in the bankruptcy proceedings, and are doubtless in many instances, if not in all, outlawed by the Statute of Limitations.

Can a state of more complete chaos be imagined than this which would inevitably result from the overturning of vested rights based upon legal proceedings that have not been disturbed for more than two years since the determination of the Appellate Court refusing to review the same and which are now sought

to be reconsidered on the application of parties who have had their day in Court, but who don a mask and inform the Court that they are other than what they were when the decision was rendered against them.

We submit that upon such a showing this Court should not disturb the proceedings heretofore had in the matter of the bankruptcy of the American Copper Company.

POINT IV.

The petition for revision should be dismissed.

Respectfully submitted,

GRIGGS, BALDWIN & PIERCE,
Attorneys for and of Counsel with American Copper & Gold Co., an *amicus curiæ* by leave of this Court.

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